Petition

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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

THE CRUDE COMPANY and JOHN ALLEN MASEK,
Petitioners,

v.

UNITED STATES of AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the Temporary Emergency Court of Appeals' exclusive jurisdiction of appeals from the district courts in cases and controversies "arising under" the Emergency Petroleum Allocation Act encompasses an appeal from a dismissal of an indictment on the grounds that

   (a) the criminal provisions of the Act preempt application of the federal false statement, mail fraud, and RICO statutes to alleged violations of a regulation promulgated under the Act; and

   (b) the regulation that the defendants are alleged to have violated does not give fair notice and therefore cannot constitutionally be the basis of a criminal prosecution.

2. Whether the regulation promulgated under the Emergency Petroleum Allocation Act requiring certification of "old" and "new" oil gives fair notice of the conduct it requires.

3. Whether the criminal provisions of the Emergency Petroleum Allocation Act preempt the application of the federal false statement, mail fraud, and RICO statutes to alleged violations of a regulation promulgated under the Act.

4. Whether a statement made by one private party to another is brought within the ambit of the federal false statement statute because the party to whom the statement is made relies on it in a report filed with the federal government.

LIST OF PARTIES

Parties to the proceeding in the court of appeals are: *

(1) The Crude Company, Defendant-Petitioner

(2) John Allen Masek, Defendant-Petitioner

(3) Uni Oil, Inc., Defendant

(4) Thomas M. Hajecate, Defendant

(5) Thomas H. Hajecate, Defendant

(6) Charles R. Akin, Defendant

(7) R. Stanley Corbitt, Defendant

(8) United States of America, Plaintiff-Respondent

Pursuant to Rule 28.1, Petitioner The Crude Company states that it is a Wyoming corporation with no parent companies, subsidiaries, or affiliates.

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* Although named in the indictment, Mid-Atlantic Petroleum Co., Ltd. and H.C. Iran, Ltd. did not appear.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED FOR REVIEW	i
TABLE OF AUTHORITIES	v
OPINIONS BELOW	1
JURISDICTION	2
CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	3
REASONS WHY THE WRIT SHOULD BE GRANTED	6
1. The court of appeals' decision that the TECA lacks exclusive appellate jurisdiction where a district court holds that the EPAA preempts another statute and that an EPAA regulation is unconstitutionally vague is in conflict with the decisions of other courts	6
(a) The court of appeals' decision that the question whether the EPAA preempts another statute is not an EPAA issue conflicts with decisions of the Second Circuit, the Tenth Circuit, and the TECA	9
(b) The court of appeals' decision that the constitutional issue adjudicated by the district court is not an EPAA issue also conflicts with the decisions of other courts	16
2. The EPAA regulations are unconstitutionally vague and fail to provide fair warning of what obligations they impose	19

TABLE OF CONTENTS—Continued

Page

3. The criminal provisions of the EPAA preempt the application of the federal false statement, mail fraud, and RICO statutes to conduct involving alleged miscertification of the regulatory category of oil 21

4. A statement made by one private party to another does not become punishable under the federal false statement statute merely because the party to whom the statement is made relies on it in a report filed with the federal government.. 24

CONCLUSION 29

TABLE OF AUTHORITIES

Cases: Page

American Federation of Labor v. *Watson*, 327 U.S. 582 (1946) 14
Bray v. *United States*, 423 U.S. 73 (1975) 7, 13, 14, 18
Busic v. *United States*, 446 U.S. 398 (1980) 21
Citronelle-Mobile Gathering, Inc. v. *Gulf Oil Corp.*, 591 F.2d 711 (Temp. Emer. Ct. App.), *cert. denied*, 444 U.S. 879 (1979) 7, 9, 12, 18-19
Coastal States Marketing, Inc. v. *New England Petroleum Corp.*, 604 F.2d 179 (2d Cir. 1979) .. 7, 8, 9, 18
Connally v. *General Construction Co.*, 269 U.S. 385 (1926) 17
Consolidated Rail Corp. v. *State of Illinois*, 423 F. Supp. 941, (Spec. Ct. 1976), *cert. denied*, 429 U.S. 1095 (1977) 8
Friedman v. *United States*, 374 F.2d 363 (8th Cir. 1967) 28
Hagans v. *Lavine*, 415 U.S. 528 (1974) 12
Hines v. *Davidowitz*, 312 U.S. 52 (1941) 21
M. Kraus & Bros., Inc. v. *United States*, 327 U.S. 614 (1946) 17, 20
Lanzetta v. *New Jersey*, 306 U.S. 451 (1939) 19
Louisville and Nashville Railroad Co. v. *Mottley*, 211 U.S. 149 (1908) 7-8, 14
Mobil Oil Corp. v. *Dubno*, 639 F.2d 919 (2nd Cir.), *cert. denied*, 101 S. Ct. 3122 (1981) 9
Mobil Oil Corp. v. *Tully*, 499 F. Supp. 888 (N.D. N.Y. 1980) 10
Mobil Oil Corp. v. *Tully*, 639 F.2d 912 (2nd Cir.), *cert. denied*, 101 S. Ct. 3123 (1981) 9-10, 12, 18
Mountain Fuel Supply Co. v. *Johnson*, 586 F.2d 1375 (10th Cir. 1978), *cert. denied*, 441 U.S. 952 (1979) 7, 9, 13, 18
National Petroleum Refiners Association v. *Federal Trade Commission*, 482 F.2d 672 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 951 (1974) 27

TABLE OF AUTHORITIES—Continued

	Page
Newell v. *Federal Energy Administration*, 591 F.2d 704 (Temp. Emer. Ct. App. 1979)	7, 9, 18
New York Telephone Co. v. *New York State Dept. of Labor*, 440 U.S. 519 (1979)	14
Panama Refining Co. v. *Ryan*, 293 U.S. 388 (1935)	26
Perez v. *Campbell*, 402 U.S. 637 (1971)	21
St. Mary's Hospital of East St. Louis, Inc. v. *Ogilvie*, 496 F.2d 1324 (7th Cir. 1974)	8
Simpson v. *United States*, 435 U.S. 6 (1978)	21
Smith v. *Goguen*, 415 U.S. 566 (1974)	20
M. Spiegel & Sons Oil Corp. v. *B. P. Oil Corp.*, 531 F.2d 669 (2d Cir. 1976)	18
Swift & Co. v. *Wickham*, 382 U.S. 111 (1965)	21
United States v. *Baker*, 626 F.2d 512 (5th Cir. 1980)	27
United States v. *Bedore*, 455 F.2d 1109 (9th Cir. 1972)	28
United States v. *Beer*, 518 F.2d 168 (5th Cir. 1975)	21
United States v. *Bramblett*, 348 U.S. 503 (1955)	25-26, 27
United States v. *L. Cohen Grocery Co.*, 255 U.S. 81 (1921)	20
United States v. *Cohn*, 270 U.S. 339 (1926)	25
United States v. *Cooper*, 482 F.2d 1393 (Temp. Emer. Ct. App. 1973)	11
United States v. *Gilliland*, 312 U.S. 86 (1941)	26
United States v. *Harriss*, 347 U.S. 612 (1954)	17
United States v. *Hooper*, 596 F.2d 219 (7th Cir. 1979)	27-28
United States v. *Powell*, 423 U.S. 87 (1975)	20
United States v. *Wickland*, 619 F.2d 75 (Temp. Emer. Ct. App. 1980)	12, 19
United States v. *Zang*, 645 F.2d 999 (Temp. Emer. Ct. App. 1981)	11-12, 23-24
United States v. *Zang*, 653 F.2d 493 (Temp. Emer. Ct. App. 1981), *cert. denied*, 50 U.S.L.W. 3248 (Oct. 5, 1981)	11

TABLE OF AUTHORITIES—Continued

Statutes: Page

Act of October 23, 1918, Ch. 194, § 35, 40 Stat. 1015 25
Act of June 18, 1934, Ch. 587, § 35, 48 Stat. 996.... 25
Act of April 4, 1938, Pub. L. No. 75-465, 52 Stat. 197 27
Act of June 25, 1948, Pub. L. No. 80-772, Ch. 645, 62 Stat. 683 27
Connally Hot Oil Act, Pub. L. No. 74-14, 49 Stat. 30 (1935) 26
Economic Stabilization Act of 1970, Section 211 (b) (2), 12 U.S.C. § 1904, Note ..... *passim*
18 U.S.C. § 287 27
18 U.S.C. § 1001 ..... *passim*
18 U.S.C. § 1341 ..... *passim*
18 U.S.C. § 1962 ..... *passim*
Emergency Petroleum Allocation Act, 15 U.S.C. § 751, *et seq.* ..... *passim*
Energy Policy and Conservation Act of 1975, Pub. L. No. 94-163, 89 Stat. 871 22
National Industrial Recovery Act, Pub. L. No. 73-67, § 9, 48 Stat. 195 (1933) 26
28 U.S.C. § 1254(1) 2
28 U.S.C. § 1291 7
28 U.S.C. § 1331 14
28 U.S.C. § 1337 14

Code of Federal Regulations:

10 C.F.R. § 212.131 ..... 3, 18, 19
10 C.F.R. § 205.202 ..... 3, 22-23

Miscellaneous:

Brief for Appellant, No. 79-2488, *United States* v. *Uni Oil, Inc.*, 646 F.2d 946 (5th Cir. 1981)..... 15
The Federal Energy Administration: Enforcement of Petroleum Price Regulations, Report of the Subcommittee on Administrative Practice and Procedure of the Senate Committee on the Judiciary, 94th Cong., 1st Sess. (1975) 22

TABLE OF AUTHORITIES—Continued

	Page
46 Fed. Reg. 36099 (1981)	20
Hart, *The Relations Between State and Federal Law*, 54 Colum. L. Rev. 489 (1954)	8
Hearing of the House Committee on Energy and Commerce, Subcommittee on Oversight and Investigations, April 3, 1981	20-21
Letter from the Secretary of the Interior to the Chairman of the Senate Judiciary Committee, May 2, 1934	26
Note, *The Appellate Jurisdiction of the Temporary Emergency Court of Appeals*, 64 Minn. L. Rev. 1247 (1980)	7-8
Note, *Criminal Liability for False Statements to Federal Law Enforcement Officials*, 63 Va. L. Rev. 451 (1977)	26
Reply Brief of Appellant W. Darrell Zang, *United States* v. *Zang*, 645 F.2d 999 (Temp. Emer. Ct. App. 1981)	11-12
Report of the Senate Committee on Banking, Housing, and Urban Affairs, S. Rep. No. 92-507, 91st Cong., 1st Sess., *reprinted in* 1971 U.S. Code Cong. & Ad. News 2283	7
S. Rep. No. 1202, 73d Cong., 2d Sess. (1934)	26
S. Rep. No. 94-516, 94th Cong., 1st Sess., *reprinted in* 1975 U.S. Code Cong. & Ad. News 2041	23
C. Wright, A. Miller, & E. Cooper, 17 *Federal Practice and Procedure* § 4105 (1980 Supp.)	9

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No. ———

THE CRUDE COMPANY and JOHN ALLEN MASEK,
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v.

UNITED STATES of AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioners, The Crude Company ("TCC") and John Allen Masek ("Masek"), pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit,[1] which reversed the District Court's judgment dismissing an indictment brought against TCC, Masek, and others.[2]

OPINIONS BELOW

The opinion of the court of appeals, dated May 19, 1981, and reported at 646 F.2d 946, and the opinion denying rehearing and rehearing *en banc*, rendered September 4, 1981, and reported at 655 F.2d 85, are printed in the Appendix to this Petition. (A. 1a-19a). The oral and written opinions of the District Court, rendered on

[1] (A. 1a). References to the Appendix to this Petition, which is separately bound, will be cited as "A. ——." References to the Record on Appeal will be to the Appendix in the court of appeals and will be cited as "CA App. ——."

[2] Insofar as other parties to the consolidated proceedings in the Fifth Circuit raise questions for certiorari which are pertinent to these petitioners, we hereby respectfully adopt such questions by reference.

July 24 and July 25, 1979, are also printed in the Appendix to this Petition. (A. 20a, 23a).

JURISDICTION

The court of appeals filed its opinion and entered its judgment on May 19, 1981. (A. 1a). Timely petitions for rehearing and for rehearing *en banc* were denied in a *per curiam* opinion on September 4, 1981. (A. 18a). The court of appeals granted a stay of the mandate until October 3, 1981, and thereafter by order of October 8, 1981, extended the stay of mandate to November 4, 1981, pending the filing of this Petition. Copies of these orders staying the mandate are printed in the Appendix to this Petition. (A. 28a; 31a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) (1976).

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

Relevant portions of the following constitutional, statutory, and regulatory provisions are set forth in the Appendix to this Petition (A. 32a-43a):

Constitution:

Fifth Amendment to the United States Constitution

Statutes:

12 U.S.C. § 1904, Note (1976) (provision that gave the Temporary Emergency Court of Appeals jurisdiction of all appeals in cases and controversies arising under the Economic Stabilization Act)

15 U.S.C. § 754 (1976) (provision of the Emergency Petroleum Allocation Act prescribing criminal penalties for violation of regulations promulgated thereunder, and incorporating the jurisdictional provisions of the Economic Stabilization Act)

18 U.S.C. § 1001 (1976) (false statement statute)

18 U.S.C. § 1341 (1976) (mail fraud statute)

18 U.S.C. § 1962 (1976) (RICO statute)

Regulations:

10 C.F.R. § 212.131 (regulation under the Emergency Petroleum Allocation Act requiring the certification of "old" and "new" oil)

10 C.F.R. § 205.202 (regulation under the Emergency Petroleum Allocation Act making any practice that circumvents regulations under the Act a violation of the regulations)

STATEMENT OF THE CASE

Pursuant to its authority under the Emergency Petroleum Allocation Act (EPAA), 15 U.S.C. § 751 *et seq.* (1976), the Federal Energy Administration (FEA) promulgated a regulation classifying domestically produced oil as either "old" oil or "new" oil. "Old" oil was subject to a lower price ceiling than "new" oil. 10 C.F.R. § 212.131. The distinction does not derive from any physical difference between "old" oil and "new" oil; rather, the distinction was created by the regulations and depends upon base-year production levels. When a reseller transacts a sale to a purchaser, the regulation requires that the reseller certify to the purchaser the quantities of "old" and "new" oil included in the transaction. 10 C.F.R. § 212.131(b)(1). The certification requirement ostensibly served to tag the oil as it moved into the marketplace, allowing purchasers to distinguish the high-priced "new" oil from the low-priced "old" oil.

On April 30, 1979, a federal grand jury in Houston, Texas, returned a 29-count indictment against two domestic companies involved in the reselling of crude oil (including TCC), several individuals associated with them (including Masek), and two foreign corporations. (A. 44a). In essence the indictment charged that the defendants participated in a fraudulent scheme to "miscertify" "old" oil as "new" oil and that they made false certifications in furtherance of that scheme. Petitioners TCC and Masek were both accused of 21 counts of mail fraud, 18 U.S.C. § 1341 (1976), based on 21 invoices alleged to contain miscertifications of the amounts of "old" and "new" oil being sold. In addition, petitioners

TCC and Masek were both charged with six counts of making false statements in a matter within the jurisdiction of the FEA, 18 U.S.C. § 1001 (1976), based on six alleged miscertifications submitted to purchasers in connection with the sale of crude oil. Masek was also charged with participating in a pattern of racketeering activity in violation of 18 U.S.C. § 1962(c) (1976), the predicate offenses being the alleged violations of the mail fraud statute, and with conspiring to violate 18 U.S.C. § 1962(c) (1976), in violation of 18 U.S.C. § 1962(d) (1976). (A. 44a-77a). Although each count of the indictment charged a violation of a section of Title 18, each count depended upon an alleged violation of the certification regulation promulgated under the EPAA.

On June 22, 1979, TCC and Masek moved to dismiss the indictment, arguing, *inter alia*: (1) that the EPAA preempts application of 18 U.S.C. §§ 1001, 1341, and 1962 to the conduct alleged in the indictment; and (2) that the certification regulation does not give fair notice and therefore cannot be the predicate for a criminal prosecution. (CA App. 58-89). With respect to the six counts based on 18 U.S.C. § 1001, defendants also sought dismissal on the further ground that the statute does not apply to statements, such as EPAA certifications, which are not submitted to the government and do not provide the basis for the procurement of government funds. (CA App. 56).

On July 24, 1979, the trial court, in an oral ruling from the bench, dismissed the indictment "for the reasons stated in the briefs of the defendants." (A. 23a). The trial judge stated that "[m]y main concern, the reason why I am going to grant the motion, is [that] I think the way the Government should proceed in this matter is under the Energy Act." *Id.* On July 25, 1979, a written order was entered, dismissing all counts of the indictment "for the reasons set out in Defendants' briefs." (A. 20a). The government noted an appeal from the order of dismissal to the United States Court

of Appeals for the Fifth Circuit. (CA App. 152).[3] The government did not note an appeal to the Temporary Emergency Court of Appeals ("TECA").

On appeal, TCC and Masek argued that the Fifth Circuit lacked jurisdiction because the TECA has exclusive jurisdiction over appeals from district court decisions in cases and controversies arising under the EPAA. *See* 15 U.S.C. § 754. Petitioners contend that the TECA has exclusive appellate jurisdiction whenever a district court adjudicates an EPPA issue (*i.e.*, an issue involving the applicability or effect of the EPAA), including issues raised by way of defense. Petitioners contended that the question whether the EPAA preempts application of the federal criminal statutes relied upon in the indictment is an EPAA issue, and that the question whether the EPAA regulation whose violation was charged in the indictment is unconstitutionally vague is also an EPAA issue. Petitioners further maintained that the trial court decision was correct on the merits.

The Fifth Circuit held that it had jurisdiction over the appeal and that the district court had erred in dismissing the indictment. Although the district court had sustained the defendants' contentions that the EPAA preempts application of 18 U.S.C. §§ 1001, 1341, and 1962 to miscertification of "old" oil as "new" oil, and that the EPAA certification regulation does not give fair notice of the conduct it requires, the Fifth Circuit concluded that no EPAA issue had been raised or adjudicated. Having staked out its jurisdiction, the Fifth Circuit proceeded to reverse the District Court's conclusion on the merits, holding that "the question presented here is not properly cast as one of preemption" (A. 13a n.5), and that the vagueness of the certification requirements is irrelevant because the defendants were charged under

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[3] The instant case was consolidated for argument and decision below with *United States* v. *Uni Oil Co., Inc.*, No. 79-2488, in which the government also appealed from the dismissal of an indictment concerning an alleged scheme to miscertify oil.

Title 18 and the government would not prevail at trial unless it proved that the defendants knew that the certifications were false. (A. 7a)

Defendants timely filed petitions for rehearing and rehearing *en banc*. On September 4, 1981, the Fifth Circuit issued a *per curiam* opinion in which it denied the petitions for rehearing but modified the portion of its original opinion concerning the federal false statement statute. The panel revised its discussion of § 1001 to take account of the absence of any evidence in the record to support the statement in the original opinion that the statements reached or influenced the FEA. (A. 18a-19a).

REASONS WHY THE WRIT SHOULD BE GRANTED

1. The court of appeals' decision that the TECA lacks exclusive appellate jurisdiction where a district court holds that the EPAA preempts another statute and that an EPAA regulation is unconstitutionally vague is in conflict with the decisions of other courts.

When Congress enacted the EPAA, 15 U.S.C. § 751 *et seq.* (1976), it gave the TECA, rather than the circuit courts, jurisdiction to review decisions by district courts in cases and controversies arising under the Act. The EPAA incorporates Section 211(b)(2) of the Economic Stabilization Act of 1970 (ESA), as amended, *see* 12 U.S.C. § 1904, Note, *incorporated by reference in* 15 U.S.C. § 754(a)(1), which stated as follows:

> "The Temporary Emergency Court of Appeals shall have exclusive jurisdiction of all appeals from the district courts of the United States *in cases and controveries arising under this title or under regulations* or orders issued thereunder."[4] (Emphasis supplied.)

Congress thus created an "exception to the broad jurisdiction of the courts of appeals over 'appeals from all

[4] Although the ESA itself is no longer in effect, this jurisdictional provision remains in force as incorporated in the EPAA.

final decisions of the district courts of the United States.'" *Bray* v. *United States*, 423 U.S. 73, 74 (1975) (*quoting* 28 U.S.C. § 1291 (1976)).

Since the indictment here did not purport to plead criminal offenses under the EPAA, the threshhold question addressed by the opinion below was whether the words "arising under" in the TECA's exclusive jurisdictional statute limit its jurisdiction to cases in which the indictment or complaint is itself based upon the EPAA. *Cf. Louisville and Nashville Railroad Co.* v. *Mottley*, 211 U..S 149, 152 (1908) ("a suit arises under the Constitution or laws of the United States only when the plaintiff's statement of his own cause of action shows that it is based upon those laws or that Constitution"). This question is obviously of great importance in the division of jurisdiction between the TECA and the circuit courts. Most courts considering the matter have held that the TECA's "arising under" jurisdiction, in contrast to the federal question jurisdiction of the district courts, is not determined solely by the allegations of the indictment or complaint, but instead includes EPAA issues raised by way of counterclaim or defense.[5]

Applying the *Mottley* rule in determining the TECA's jurisdiction would be inconsistent with the congressional purpose "to funnel into one court all the appeals arising out of District Courts and thus gain in consistency of decision."[6] *See Citronelle-Mobile Gathering, Inc.* v. *Gulf Oil Corp.*, 591 F.2d at 716; Note, *The Appellate Jurisdiction of the Temporary Emergency Court of Appeals*,

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[5] *See Mountain Fuel Supply Co.* v. *Johnson*, 586 F.2d 1375, 1383-84 (10th Cir. 1978), *cert. denied*, 441 U.S. 952 (1979); *Citronelle-Mobile Gathering, Inc.* v. *Gulf Oil Corp.*, 591 F.2d 711, 715-16 (Temp. Emer. Ct. App.), *cert. denied*, 444 U.S. 879 (1979); *Newell* v. *Federal Energy Administration*, 591 F.2d 704, 710-11 (Temp. Emer. Ct. App. 1979); *Coastal States Marketing Inc.* v. *New England Petroleum Corp.*, 604 F.2d 179, 187 (2d Cir. 1979).

[6] *Report of the Senate Committee on Banking, Housing and Urban Affairs*, S. Rep. No. 92-507, 91st Cong., 1st Sess. 10, *reprinted in* 1971 U.S. Code Cong. & Ad. News 2283, 2292.

64 Minn. L. Rev. 1247, 1264 (1980). Furthermore, the rationale for the *Mottley* rule does not apply to the determination of the TECA's jurisdiction. The rule allows a federal district court to determine jurisdiction "at the outset of the proceeding rather than making it dependent upon the unpredictable contingencies of the defenses or replications which may be made." Hart, *The Relations Between State and Federal Law*, 54 Colum. L. Rev. 489, 520 n.108 (1954). But as Judge Newman observed in *Coastal States Marketing, Inc.* v. *New England Petroleum Corp.*, 604 F.2d at 186, "[w]hatever the hazards might be in forecasting whether a federal question will really be in controversy when pleaded in an answer, no similar risks are encountered in routing to a specialized federal appellate court all issues within its special competence that have actually been adjudicated in a district court." [7]

One circuit has held that the *Mottley* rule does apply to the determination of the TECA's exclusive appellate jurisdiction. *St. Mary's Hospital of East St. Louis, Inc.* v. *Ogilvie*, 496 F.2d 1324 (7th Cir. 1974). In its opinion in *St. Mary's Hospital*, however, the Seventh Circuit did not discuss either the rationale of the well-pleaded complaint rule or the legislative purpose underlying the vesting of exclusive jurisdiction in a single appellate court.[8]

Notwithstanding the decision in *St. Mary's Hospital*, the trend of authority suggests that the TECA has ex-

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[7] *Cf. Consolidated Rail Corp.* v. *State of Illinois*, 423 F. Supp. 941, 947 (Spec. Ct. 1976), *cert. denied*, 429 U.S. 1095 (1977) ("[t]here is no apparent reason, apart from considerations of symmetry," to apply the well-pleaded complaint rule in delineating the exclusive jurisdiction of the Special Court under the Regional Rail Reorganization Act).

[8] Review on certiorari in this case would thus afford an opportunity to resolve the conflict among the circuits on the threshhold question whether EPAA issues not raised in the complaint or indictment can bring a case within the TECA's "arising under" jurisdiction.

clusive appellate jurisdiction not only where the complaint or indictment is based upon the EPAA, but also where a district court decides an EPAA issue raised by a counterclaim [9] or by a defense.[10] The court below thus joined the majority of courts in holding that the TECA "is vested with jurisdiction over any EPAA issue adjudicated by a district court." (A. 10a).

(a) ***The court of appeals' decision that the question whether the EPAA preempts another statute is not an EPAA issue conflicts with decisions of the Second Circuit, the Tenth Circuit, and the TECA.***

In holding that the TECA does not have exclusive appellate jurisdiction where a district court determines that the EPAA preempts the application of another statute, the court of appeals reached a conclusion in conflict with decisions of the Second Circuit, the Tenth Circuit, and the TECA. This precedent, if allowed to stand, could severely disrupt the congressional plan for proper allocation of jurisdiction between the TECA and the circuit courts.

The decision below is directly contrary to the decision of the Second Circuit in *Mobil Oil Corp.* v. *Tully*, 639 F.2d 912 (2nd Cir.), *cert. denied*, 101 S. Ct. 3123 (1981).[11] In *Tully* the Second Circuit recognized that it had no jurisdiction to hear an appeal from a district court decision holding that the EPAA preempts a state statute taxing the gross receipts of oil companies and prohibiting the companies from passing the tax through

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[9] *See Mountain Fuel Supply Co.* v. *Johnson*, 586 F.2d at 1383-84; *Citronelle-Mobile Gathering, Inc.* v. *Gulf Oil Corp.*, 591 F.2d at 715-16.

[10] *See Newell* v. *Federal Energy Administration*, 591 F.2d at 710-11; *Coastal States Marketing, Inc.* v. *New England Petroleum Corp.*, 604 F.2d at 197. *See generally* C. Wright, A. Miller, & E. Cooper, 17 Federal Practice and Procedure § 4105 (1980 Supp.).

[11] *See also Mobile Oil Corp.* v. *Dubno*, 639 F.2d 919 (2nd Cir.), *cert. denied*, 101 S. Ct. 3122 (1981) (companion case reaching same conclusion as to jurisdiction).

to consumers in the form of a price increase. The Second Circuit held that "[t]he preemption issue . . . does present an EPAA question" because "the determination that the state law conflicted with the federal regulations . . . necessitates 'a careful *examination of the Federal EPAA and the Mandatory Price Regulations promulgated thereunder.*'" 639 F.2d at 915 (*quoting Mobil Oil Corp.* v. *Tully*, 499 F. Supp. 888, 892 (N.D.N.Y. 1980)) (emphasis supplied). The opinion in *Tully* emphasized that "[w]hether [the district court's] analysis was correct is not properly before this court since in making the analysis the District Court was clearly construing and interpreting the EPAA and its regulations." 639 F.2d at 915.

The court of appeals here lacked jurisdiction for the same reason that the Second Circuit lacked jurisdiction in *Tully*.[12] The district court expressly stated that "[m]y main concern, the reason why I am going to grant the motion [to dismiss the indictment], is [that] I think *the way the Government should proceed in this matter is under the Energy Act.*" (A. 23a) (emphasis supplied). In holding that the EPAA preempts application of 18 U.S.C. §§ 1001, 1342, and 1962 (1976) to the alleged miscertification of oil in violation of a regulation promulgated under the EPAA, the district court adjudicated an EPAA issue. Only the TECA has jurisdiction to hear an appeal from such an adjudication.

Whether the EPAA preempts application of another statute constitutes an EPAA issue, since resolution of that issue requires a determination of the effect of the EPAA. Where application of a general statute would impede achievement of the objectives of a subsequently

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[12] It is of no moment that in *Tully* the question was whether EPAA preempted a state statute, whereas here the district court held that the EPAA preempts another federal statute. The district court decisions in both cases required a construction of the EPAA, and both decisions should therefore be appealable only to the TECA.

enacted statute specifically addressing certain conduct, the specific statute preempts the general statute. *See* point 3 *infra*. The defendants relied on this principle in their motion to dismiss the indictment. (CA App. 77-85). In holding that the EPAA does preempt 18 U.S.C. §§ 1001, 1341, and 1962, the district court necessarily concluded that application of those general federal criminal statutes *would* interfere with the fulfillment of the congressional objectives underlying the EPAA. What the Second Circuit said in *Tully* is equally applicable here: "[I]n making the analysis the District Court was clearly construing and interpreting the EPAA and its regulations." 639 F.2d at 915. The preemption issue was therefore an EPAA issue.[13]

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[13] The court of appeals erred in relying on *United States* v. *Cooper*, 482 F.2d 1393 (Temp. Emer. Ct. App. 1973). (A. 7a-8a). The defendant in *Cooper* was accused of making false statements concerning a matter within the jurisdiction of a federal agency, in violation of 18 U.S.C. § 1001, in that he made false representations to the IRS in an attempt to demonstrate that the rents he was charging his tenants did not contravene rent control regulations promulgated under the ESA. Following conviction and appeal to the TECA, that court held that the charge did not arise under the ESA and that jurisdiction over the appeal therefore lay with the Ninth Circuit. 482 F.2d at 1397-98. *Cooper* is plainly distinguishable from the instant case, however, because there no claim based on the ESA or the EPAA was raised as a defense to the indictment.

The jurisdictional posture of this case is also significantly different from that of *United States* v. *Zang*, where the TECA dismissed, for lack of jurisdiction, an appeal from the denial of a motion to dismiss an indictment, 645 F.2d 999 (1981), and thereafter dismissed, again for lack of jurisdiction, a subsequent appeal from the denial of a motion for judgment of acquittal, a motion for new trial, and a motion in arrest of judgment, 653 F.2d 493 (1981), *cert. denied*, 50 U.S.L.W. 3248 (Oct. 5, 1981). Although the defendants in *Zang* contended that the EPAA preempted application of Title 18 to alleged miscertification of oil, they did not maintain that the district court's adjudication of that *defense* brought the case within the TECA's appellate jurisdiction. Instead, they maintained that the *indictment* arose under the EPAA. *See* Reply Brief of Appellant W. Darrell Zang at 4, 645 F.2d 999 ("It is clear

The court of appeals' decision not only conflicts with the Second Circuit's decision in *Tully* concerning the precise question whether the TECA has exclusive appellate jurisdiction where a district court has adjudicated a claim that the EPAA preempts another statute. It also conflicts with decisions of the Tenth Circuit and the TECA holding that any dispositive issue requiring a determination of the applicability or effect of the EPAA is an EPAA issue, and that an appeal from such an adjudication can be heard only by the TECA. In *Citronelle-Mobile Gathering, Inc.* v. *Gulf Oil Corp.*, 591 F.2d at 716, for example, the TECA held that it had exclusive jurisdiction because the district court had adjudicated a counterclaim that "depend[ed] on the retroactive application *vel non* of the EPAA amendments." Significantly, the TECA and the Tenth Circuit have held, in contrast to the decision below, that an issue involving the construction of the EPAA is an EPAA issue even if its resolution also entails consideration of other sources of law.

Thus, in *United States* v. *Wickland*, 619 F.2d 75 (Temp. Emer. Ct. App. 1980), the TECA concluded that it had jurisdiction to hear an appeal from a district court decision that the Department of Energy (DOE) was not estopped from enforcing a subpoena issued under a provision of the EPAA authorizing the issuance of subpoenas in DOE investigations. The TECA explicitly rejected the oil company's contention that "this case presents only 'general legal issues' of estoppel and subpoena enforcement which the court of appeals can confront without addressing ESA or EPAA questions." *Id.*

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from . . . the material which the Government has presented that this Indictment is a case or controversy arising under the EPAA."). The TECA thus was not required to decide whether, quite apart from the indictment, the defendants' preemption defense raised an EPAA issue. *Cf. Hagans* v. *Lavine*, 415 U.S. 528, 532 n.5 (1974) (when a question of jurisdiction is passed on *sub silentio*, the Court is not bound in a later case that squarely presents the question).

at 78. Although the court acknowledged the relevance of general principles of administrative law, it held that an EPAA issue was presented because "[a]ny 'general questions of administrative law' are clearly interwoven with provisions of the ESA and EPAA and invoke policy questions directly affecting the EPAA and its enforcement." *Id.* at 79.

The Tenth Circuit reached a similar conclusion in *Mountain Fuel Supply Co.* v. *Johnson*, 586 F.2d 1375. There the plaintiff brought an action for breach of a contract in which it had agreed to sell crude oil to the defendant. The defendant filed a counterclaim for breach of contract, alleging that plaintiff had disregarded and wrongfully terminated the contract by certain action alleged to violate the EPAA. While the Tenth Circuit noted that the counterclaim implicated principles of contract law, it held that the TECA had exclusive jurisdiction because "these 'contract law' allegations are not separable from the federal acts and regulations." *Id.* at 1384.

Finally, the Fifth Circuit's decision here is inconsistent with the standard implicit in this Court's decision in *Bray* v. *United States*, 423 U.S. 73 (1975) (*per curiam*). In *Bray* the defendant was convicted of criminal contempt for refusal to comply with an IRS subpoena issued in the course of an investigation into possible violations of the ESA. The Court of Appeals for the Tenth Circuit dismissed the defendant's appeal, holding that TECA had exclusive jurisdiction. This Court granted the defendant's petition for certiorari and vacated the Tenth Circuit's decision, stating that "[r]eview in the TECA of criminal contempt convictions relating to compliance investigations or enforcement efforts is *not necessary to assure uniform interpretation of the substantive provisions of the stabilization scheme.*" *Id.* at 75 (emphasis supplied).[14]

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[14] This Court has also recognized in other jurisdictional contexts that a claim that one law preempts another arises under the

Just as the TECA has not been given exclusive jurisdiction where such jurisdiction is "not necessary to assure uniform interpretation of the substantive provisions" of the ESA or the EPAA, the TECA *should* have exclusive jurisdiction where such jurisdiction *is* necessary to assure a uniform interpretation. But the opinion below misapplied the teaching of *Bray*, holding that "[b]ecause the preemption issue concerns only the EPAA's effect on an unrelated criminal statute, '[r]eview in the TECA . . . is not necessary to assure uniform interpretation of the *substantive* provisions'" of the EPAA. (A. 12a-13a) (*quoting Bray* v. *United States*, 423 U.S. at 75; emphasis supplied by Fifth Circuit). This conclusion, for which the opinion below offered no supporting reasons, cannot withstand scrutiny.

The legislative history of the ESA demonstrates that the creation of a special appellate court to hear all appeals in cases arising under the statute reflected a fear that inconsistent appellate decisions would lead to "breaks or stays in the operation of the Stabilization Program." S. Rep., *supra*, at 10. The incorporation in the EPAA of the ESA's provisions concerning the TECA obviously

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law that assertedly occupies the field. For example, when an injunction is sought against enforcement of a state statute on the ground that it conflicts with federal law, the case arises under federal law and jurisdiction therefore lies under 28 U.S.C. § 1331 (1976), the general federal question statute. *See, e.g., New York Tel. Co.* v. *New York State Dept. of Labor*, 440 U.S. 519 (1979). If the particular federal law relied upon is a statute regulating commerce, the controversy arises under an "Act of Congress regulating commerce" and the federal courts consequently have jurisdiction under 28 U.S.C. § 1337 (1976). *See, e.g., American Federation of Labor* v. *Watson*, 327 U.S. 582, 591 (1946) (construing predecessor of § 1337). In these situations, to be sure, the preemption issue is raised by the initial pleading, rather than by defense. But that distinction goes to the separate question whether the *Mottley* rule should limit the TECA's exclusive appellate jurisdiction. Once it is established that the *Mottley* rule should not be applied in determining the TECA's jurisdiction, this Court's decisions in such cases as *New York Tel. Co.* and *Watson* suggest that the preemption issue raised here is indeed an EPAA issue.

reflected a similar concern with respect to the regulatory scheme imposed by the EPAA. The important question is thus whether that regulatory scheme would be threatened by inconsistent appellate decisions concerning the effect of the EPAA's criminal provisions on prosecutions brought under general criminal statutes on the basis of conduct proscribed by regulations promulgated under the EPAA.

This question must be answered in the affirmative. The government itself argued to the court below that a decision concerning the preemption issue has a major impact on its oil pricing enforcement scheme:

> "The action of the district court in Houston . . . confuses the entire oil pricing criminal enforcement program.
>
> * * * *
>
> The present shortage of petroleum products, and the prospects that this condition will be chronic, necessitates an effective enforcement program at the earliest possible moment."

Brief for Appellant, No. 79-2488, at II-III. It is obviously of great importance to both the government and the regulated industry to have the TECA decide once and for all, subject only to review by this Court, whether parties accused of violating regulations issued under the EPAA may be prosecuted for the general criminal offenses proscribed by Title 18 of the United States Code—which are punishable by substantial prison sentences—or whether the EPAA's less severe criminal penalties and its unique requirement of notice, *see* 15 U.S.C. § 754(a)(4),[15] were meant to be exclusive. Inconsistent decisions by different circuits would leave individuals in some jurisdictions subject to substantial criminal penalties without prior notice of the violation, while individuals in other jurisdictions would receive the protection of the EPAA's specific notice provisions.

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[15] The requirement that a defendant have formal notice of a probable violation as a prerequisite to commission of a jailable offense is discussed in point 3 *infra*.

(b) ***The court of appeals' decision that the constitutional issue adjudicated by the district court is not an EPAA issue also conflicts with the decisions of other courts.***

The court of appeals' decision that the constitutional issue adjudicated by the district court is not an EPAA issue is also worthy of review by this Court.[16]

An EPAA issue was squarely presented by the defendants' contention that the EPAA certification regulations do not give fair notice of what conduct they require and therefore cannot support a criminal prosecution.[17] When the district court dismissed the indictment "for the reasons set out in Defendants' briefs" (A. 20a), it necessarily adjudicated that issue. Since the TECA has exclusive appellate jurisdiction over EPAA issues adjudicated by a district court, the Fifth Circuit had no jurisdiction to hear the government's appeal from this ruling.

The opinion below emphasized that the defendants' constitutional challenge to the indictment "was not an attack on [the] constitutionality of the regulations *per se*, but on the constitutionality of prosecuting a person for conduct that was made criminal without fair notice." (A. 6a-7a). The court held that since the challenge was directed at indictments brought under 18 U.S.C. §§ 1001, 1342, and 1962, "[*t*]*hat issue does not require resolution*

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[16] Since both the preemption defense and the constitutional defense apply to the entire indictment, this Court should vacate the judgment below if it concludes that *either* issue should have been reviewed by the TECA.

[17] In this motion to dismiss the indictment, the defendants argued as follows:

> "FEA's Crude Oil Certification Regulations Do Not Give 'Fair Notice' of What Conduct They Require and Under the Due Process Clause Cannot Be the Basis For Criminal Prosecution[.]" (CA App. 62).

The merits of this challenge to the indictment are discussed in point 2 *infra*.

of the constitutionality or even the interpretation of the regulations; only whether the criminal statutes clearly prescribed the conduct charged." (A. 7a) (emphasis supplied).

This holding is clear error. The court of appeals ignored the teaching of *M. Kraus & Bros., Inc.* v. *United States*, 327 U.S. 614 (1946). In *Kraus* this Court unequivocally held that when a prosecution for violation of a criminal statute ultimately rests upon an alleged violation of an administrative regulation, due process forbids conviction unless the regulation gives fair notice of the conduct it requires. *Id.* at 621-22. Since the indictment here depends upon alleged violations of the EPAA regulation governing the certification of "old" and "new" oil, it is not sufficient to consider simply the criminal statutes relied upon in the indictment. The indictment cannot stand unless the regulation itself gives fair notice, for the defendants are charged with violating the criminal statutes *by violating the regulation.*

To decide whether a regulation is sufficiently clear to support a criminal prosecution, a court plainly has to interpret the regulation. The court must determine what conduct "men of common intelligence," *Connally* v. *General Construction Co.*, 269 U.S. 385, 391 (1926), would "reasonably understand to be proscribed." *United States* v. *Harriss*, 347 U.S. 612, 617 (1954). In making this determination, the court obviously must scrutinize the language of the regulation. In *Kraus*, for example, this Court was called upon to construe a regulation in order to decide whether the defendant could be subject to criminal punishment for violating it.[18]

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[18] The court concluded as follows:

> [W]e *interpret* [the regulation] as prohibiting only those tying agreements involving secondary products that are worthless or that are sold at artificial prices. It follows that the conviction below cannot stand.

327 U.S. at 626 (emphasis supplied).

Here the district court had to construe 10 C.F.R. § 212.131(b)(1) to decide whether, as the defendants contended, it failed to provide an adequate standard to guide resellers selling oil from their inventory. It simply is not possible to resolve that issue without interpreting the regulation. When the district court resolved the issue in the defendants' favor, it therefore adjudicated an EPAA issue.

The court of appeals' decision denying the TECA jurisdiction conflicts with decisions by other circuits and by the TECA establishing that issues requiring the interpretation of the EPAA are EPAA issues. As noted at pages 7-13, *supra*, this principle has been embraced by the Second Circuit,[19] by the Tenth Circuit,[20] and by the TECA itself.[21] The court of appeals' decision is also inconsistent with the standard suggested by this Court's opinion in *Bray* v. *United States*, 423 U.S. at 75 ("Review in the TECA of criminal contempt convictions relating to compliance investigations or enforcement efforts is not necessary to assure uniform interpretation of the substantive provisions of the stabilization scheme.").

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[19] *See M. Spiegel & Sons Oil Corp.* v. *B. P. Oil Corp.*, 531 F.2d 669, 671 (1976) (*per curiam*) (the TECA has exclusive jurisdiction because "construction of the EPAA . . . will control the litigation."); *Coastal States Marketing, Inc.* v. *New England Petroleum Corp.*, 604 F.2d at 187 (EPAA issue adjudicated where district court rejected contention that certain sales violated the EPAA); *Mobil Oil Corp.* v. *Tully*, 639 F.2d at 915 (EPAA issue adjudicated where "the District Court was clearly construing and interpreting the EPAA and its regulations.")

[20] *See Mountain Fuel Supply Co.* v. *Johnson*, 586 F.2d at 1384 (1978) (EPAA issue adjudicated where district court entered a judgment in favor of defendant on counterclaim that turned upon "the language of the price and relationship freeze imposed by the federal government").

[21] *See Newell* v. *Federal Energy Administration*, 591 at 710 (1979) (EPAA issue adjudicated where "the 'applicability' of . . . Section 5(a)(1)(B) of the EPAA was argued by the parties and . . . the district court made findings on such issue"); *Citronelle-Mobile, Gathering, Inc.* v. *Gulf Oil Corp.*, 591 F.2d at 716 (the

2. The EPAA regulations are unconstitutionally vague and fail to provide fair warning of what obligations they impose.

The merits of defendants' challenge to the constitutionality of the EPAA certification regulation is also a significant issue warranting certiorari.[22] The EPAA regulation fails to provide fair warning of the obligations it imposes. Due process therefore precludes criminal prosecution for an alleged violation of the regulation. *See Lanzetta* v. *New Jersey*, 306 U.S. 451, 453 (1939).

Viewed in the light of industry practice and agency action, the regulation fails to give adequate warning. The seemingly simple certification requirement, when applied not to producers but to resellers,[23] such as the defendants, would be clear only if it were assumed that resellers have no inventory.[24] Given a "no inventory" assumption, the regulation would indicate that when a reseller buys a particular barrel of oil from a producer and sells that same barrel of oil to a refiner, he should make the same certification to the refiner that the producer made to him—since it is the same oil.

TECA has exclusive jurisdiction because issue raised by counterclaim "requires application and interpretation of the EPAA"); *United States* v. *Wickland*, 619 F.2d at 79 (the TECA has exclusive jurisdiction because district court adjudicated issue "interwoven with provisions of the ESA and EPAA and invok[ing] policy questions directly affecting the EPAA and its enforcement.").

Although the Ninth Circuit has not had occasion to address the subject in a published opinion, it is noteworthy that in *Wickland* that Court held that it lacked jurisdiction and transferred the case to the TECA. *See id.* at 77.

[22] The merits will be reviewed if, contrary to Petitioners' contention, the Fifth Circuit's jurisdiction is sustained.

[23] The regulations were apparently written with producers rather than resellers primarily in mind.

[24] The term "inventory," as used in the crude oil reselling industry, does not necessarily refer to a physical inventory. It may also denote a book inventory kept for accounting purposes.

But the regulations did *not* inform a reseller what certifications were required when, as is normally the case, a reseller sells a barrel of oil from inventory. The regulations do not indicate how the proper certification is then to be determined; since the "old" and "new" oil that the reseller previously purchased for his inventory are physically indistinguishable, it is not clear how the reseller is to certify a barrel of oil that he subsequently sells. To make this clear, the regulations would have had to indicate what accounting system a reseller should use (*e.g.*, FIFO or LIFO). Unfortunately, the regulations were silent on this score.

Thus the regulations are unconstitutionally vague. *See United States* v. *Powell*, 423 U.S. 87, 92 (1975); *Smith* v. *Goguen*, 415 U.S. 566, 577-78 (1974); *United States* v. *L. Cohen Grocery*, 255 U.S. 81 (1921). When a prosecution under a criminal statute depends upon an alleged violation of an administrative regulation, both the statute and the regulation must give fair notice. *See M. Kraus & Bros., Inc.* v. *United States*, 327 U.S. at 621.

The Fifth Circuit reversed the dismissal of the indictment by adopting the rationale that an allegation of knowing and willful violation will cure the defect of unconstitutional vagueness. (A. 7a). But this Court has held that unclear regulations cannot be saved by a clear indictment, or even by a jury finding of willfulness. *United States* v. *L. Cohen Grocery Co.*, 225 U.S. 81; *M. Kraus & Bros., Inc.* v. *United States*, 327 U.S. 614. The Fifth Circuit's ruling should be reversed, as in conflict with controlling decisions of this Court.[25]

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[25] While the EPAA regulation requiring the certification of "old" and "new" oil was removed earlier this year, 46 Fed. Reg. 36099, and the President's regulatory authority under the EPAA expired on September 30, 1981, *see* 15 U.S.C. § 760(g), the EPAA has an explicit savings clause providing that the expiration of the regulatory program shall not affect liability for conduct while the regulations were in force, whether or not a civil or criminal proceeding is pending at the time the program expired. *See id.* DOE has identified approximately $15 billion in apparent viola-

3. The criminal provisions of the EPAA preempt the application of the relevant provisions of Title 18 to conduct involving alleged miscertification of the regulatory category of oil.

In their motion to dismiss the indictment, Masek and TCC argued that to the extent 18 U.S.C. §§ 1001, 1341, and 1962 might have otherwise applied to the allegations made in the indictment, they were preempted by the specific penalty provisions of the EPAA, 15 U.S.C. § 754 (a) (3) (B). (CA App. 77-86).

The evaluation of a preemption question "is . . . inevitably one of comparing two statutes." *Swift & Co.* v. *Wickham*, 382 U.S. 111, 120 (1965). The governing rule of construction is that, when a general statute (here the provisions of Title 18) interferes with the purposes and goals of a specific statute (here the EPAA), the general statute is preempted. *Simpson* v. *United States*, 435 U.S. 6, 15 (1978); *Busic* v. *United States*, 446 U.S. 398 (1980); *United States* v. *Beer*, 518 F.2d 168, 172 (5th Cir. 1975). In determining whether two overlapping statutes are consistent, the issue is whether one "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress" in enacting the second statute. *Hines* v. *Davidowitz*, 312 U.S. 52, 67 (1941); *Perez* v. *Campbell*, 402 U.S. 637, 649 (1971).

Thus, in this case the EPAA and its legislative history must be scrutinized to determine whether its objectives would be thwarted by the application of Title 18 to the type of conduct charged herein, involving alleged miscertification of the regulatory category of oil. On this analysis, the EPAA and Title 18 provisions are clearly inconsistent.

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tions that have not yet been prosecuted, and Secretary of Energy Edwards has stated his intention to "bring all cases to justice." *Hearing of the House Committee on Energy and Commerce, Subcommittee on Oversight and Investigation*, April 3, 1981, at 33, 79 (unpublished transcript).

Under the EPAA, criminal fines may be imposed for any willful violation of a regulation. 15 U.S.C. § 754(a)(3)(B). But no officer or agent of a corporation may be imprisoned *unless he has received prior notice of a regulatory violation.* 15 U.S.C. § 754(a)(4). This notice requirement is completely absent from Title 18.

The prior notice provision is central to the penalty provisions of the EPAA. The legislative history demonstrates that in 1975, after hearings on enforcement of EPAA regulations, Congress amended the penalty provisions of the EPAA. Energy Policy and Conservation Act of 1975, Pub. L. No. 94-163, 89 Stat. 871. The amendment increased the maximum punishment for breaches of EPAA provisions and regulations.[26] Significantly, however, this modification was accompanied by the recognition that it would be unfair to punish individuals for violating regulations that Congress viewed as extremely difficult to comprehend.[27] Thus, the prior notice provision was added, to ensure that no one would be in jeopardy of imprisonment without having been clearly put on notice that he was violating a regulation.

Here, the EPAA and its regulations cover precisely the conduct which is charged under various sections of Title 18 in the indictment. The government argued below that the EPAA regulations did not cover all the conduct punishable under Title 18 in the indictment. But the government overlooked a crucial provision in the EPAA regulations. That regulation provides as follows:

> "[a]ny practice that circumvents or contravenes or results in a circumvention or contravention of the requirements of any provision of this chapter or any

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[26] The amended penalty provisions are codified at 15 U.S.C. § 754(3)(B) and (4).

[27] *The Federal Energy Administration: Enforcement of Petroleum Price Regulations, Report of the Subcommittee on Administrative Practice and Procedure of the Senate Committee on the Judiciary*, 94th Cong., 1st Sess. at 17, 26, 38 (1975).

order issued pursuant thereto is a violation of the . . . regulations stated in this chapter."

10 C.F.R. § 205.202.

The EPAA operates as the specific statute which reaches all elements of the conduct alleged to be wrongful under provisions of Title 18. There is no behavior alleged in the indictment that can be punished under the relevant Title 18 provisions which does not also entail a violation of the EPAA. *And the relevant provisions of Title 18 contain no notice requirement.*

There is another critical difference between the penalties provided by Title 18 and those provided by the EPAA. The EPAA, unlike Title 18, provides for a specifically graduated schedule of fines—some of them higher than the Title 18 provisions would allow—depending on the violator's position in the chain of distribution. 15 U.S.C. § 754(3)(B).

The EPAA provisions regarding prior notice and fines are unique—and the legislative history establishes that they are as important to the statutory scheme as the delegation of rulemaking authority itself.[28] The statutes do not simply differ in penalties; they are repugnant to one another. For the same activity, with the same intent, the EPAA forbids imposition of a prison sentence *without prior notice.* Yet if the conduct is prosecuted as a mail fraud, false statement, or RICO violation under Title 18, a person can be sentenced to years in prison.[29]

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[28] *See* note 27 *supra*; S. Rep. No. 94-516, 94th Cong., 1st Sess. at 200, *reprinted in* 1975 U.S. Code Cong. & Ad. News at 2041.

[29] *United States* v. *Zang*, 645 F.2d 999 (Temp. Emer. Ct. App. 1981) does not support the Fifth Circuit's rejection of the defendants' preemption defense. The indictment here differs from the indictment in *Zang* in one critical respect. According to the indictment in *Zang*, the defendants had contracted to sell crude oil to a purchaser at the same price that they paid for the oil, plus "gathering and handling charges." *Id.* at 1008. The gravamen of the charges in the indictment was that defendants defrauded their purchaser by lying about the price they paid, artificially

In sum, the application of Title 18 to conduct encompassed by the EPAA and its regulations critically interferes with the policies underlying the EPAA.

4. A statement made by one private party to another does not become punishable under 18 U.S.C. § 1001 merely because the party to whom the statement is made relies on it in a report filed with the federal government.

The decision below reached the unprecedented and unjustified conclusion that 18 U.S.C. § 1001 applies to any false statement made by one private party to another, whenever the party receiving the statement relies on it in a report filed with the federal government. (A. 18a-19a). The legislative history demonstrates that Congress did not intend the substantial criminal penalties provided by the statute to have such a sweeping application.

The defendants were not charged with making false statements to any department or agency of the United States. Rather, the indictment charged that "Defendants,

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inflating it by some seven million dollars. *Id.* In short, the indictment charged a garden variety fraud. The only connection between the fraud and the EPAA was that the defendants lied about the purchase price by telling their customer that the oil they purchased was "new" oil, when they knew it was "old" oil. The critical point is that, apart from any miscertification, the defendants were charged with committing fraud by lying about their original purchase price and by creating fictitious entries in their books and records to conceal the fraud.

In contrast, the indictment here does not accuse TCC and Masek of price gouging. It charges them with no criminal conduct apart from the alleged miscertification of "old" oil as "new" oil. Unlike the indictment in *Zang*, the indictment in this case *depends upon* the alleged violations of a regulation promulgated under the EPAA.

For the reasons set forth above, an indictment that rests on alleged violations of an EPAA regulation must be brought under the criminal provisions of the EPAA, or it cannot be brought at all. The merits of this proposition simply were not before the Court in *Zang*, because the indictment there alleged a fraud independent of the certification requirements.

in connection with the sale of crude oil to the oil companies listed below, submitted . . . writings . . . [falsely] certifying certain barrels of crude oil." (A. 75a). These certifications to private purchasers are the basis of the alleged violations of § 1001.

The court of appeals held that the indictment "sufficiently charges that the allegedly false certificates of defendants were relied on by refiners who prepared records which ultimately influenced FEA calculations." (A. 19a).[30] We submit that nothing in the indictment does allege that the certifications were relied on by refiners or that they influenced FEA calculations. But we do not ask this Court to grant certiorari simply to review error in construing the language of the indictment. The critical point is that, even accepting the court of appeals' construction of the indictment, it *still* fails to state an offense under § 1001, for the certifications were not made to the government.

The legislative history of § 1001 contains no indication that Congress intended the statute to apply to statements made to private parties. Until 1934, the federal false statement statute was limited to the presentation of false or fraudulent monetary claims against the United States. *See* Act of October 23, 1918, ch. 194, § 35, 40 Stat. 1015; *United States* v. *Cohn*, 270 U.S. 339 (1926). In 1934, the statute was amended to encompass "any false or fraudulent statements or representations . . . in any matter within the jurisdiction of any department or agency of the United States." Act of June 18, 1934, ch. 587, § 35, 48 Stat. 996.

As this Court noted in *United States* v. *Bramblett*, 348 U.S. 503, 507 (1955), "[t]he 1934 revision was largely

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[30] The panel revised the portion of its original opinion concerning § 1001 after defendants pointed out in their petition for rehearing that there is nothing in the record to support the statement in the original opinion that "[t]he allegedly false certifications of defendants were relied on by refiners who prepared records which were ultimately submitted to the FEA." (A. 17a).

the product of the urging of the Secretary of the Interior." In a letter to the Chairman of the Senate Judiciary Committee, Secretary Ickes explained the reasons for the expansion of the statute:

> "This proposed bill is intended to reach the large number of cases involving the shipment of 'hot' oil, where false papers are presented in connection therewith, and also those cases within the Public Works Administration where contractors are performing work payable from the Public Works Administration appropriation, and false certificates are made as to the actual wages paid."

(A. 78a). The Senate report accompanying the bill restated the objectives set forth in this letter. S. Rep. No. 1202, 73d Cong., 2d Sess. (1934).

Significantly, the "hot oil" regulatory scheme required producers, purchasers, shippers, and refiners dealing in oil shipped in interstate or foreign commerce to file certain affidavits *with the Department of the Interior. See Panama Refining Co.* v. *Ryan*, 293 U.S. 388, 405-08 (1935). As one commentator has noted, "[t]he Secretary of the Interior sought the amendments to the false statement statute so that false reports filed under the Act would be subject to criminal liability." Note, *Criminal Liability for False Statements to Federal Law Enforcement Officials*, 63 Va. L. Rev. 451, 452 n.5 (1977).[31] There is no indication that the amendment was intended to apply to statements not made to the government.

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[31] In 1934 the shipment of "hot oil" was governed by regulations promulgated under § 9(c) of the National Industrial Recovery Act, Pub. L. No. 73-67, 48 Stat. 195, 200 (1933). In January of 1935, the Supreme Court held that provision unconstitutional, *Panama Refining Co.* v. *Ryan*, 293 U.S. 388, and shortly thereafter Congress enacted the so-called Connally Hot Oil Act, Pub. L. No. 74-14, 49 Stat. 30 (1935) (current version at 15 U.S.C. §§ 715-715d (1976)). Regulations promulgated under this enactment similarly required the filing of reports with the government. *See United States* v. *Gilliland*, 312 U.S. 86, 90 (1941).

To be sure, the amendment adopted in 1934 was framed in general terms and therefore is not limited to the particular situations that it was originally designed to address. Nevertheless, the potentially limitless language of 18 U.S.C. § 1001—which is virtually identical to the language added in 1934 [32]—must be construed in light of the concerns of its framers.[33] As this Court said in *United States* v. *Bramblett*, 348 U.S. at 506-08, the words "in any matter within the jurisdiction of any department or agency of the United States" were apparently intended "to indicate that not all falsifications but only those made to government organs were reached."

Despite this dictum in *Bramblett*, lower court decisions have established that § 1001 applies to false statements that reach the government only indirectly but that provide the basis for the procurement of funds from the government. The two cases relied upon in the decision below (A. 19a) are examples of this line of cases. *See United States* v. *Baker*, 626 F.2d 512, 514 (5th Cir. 1980) ("the false statement need not be made directly to a federal agency to sustain a § 1001 conviction as long as federal funds are involved"); *United States* v. *Hooper*, 596 F.2d 219 (7th Cir. 1979) (employee super-

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[32] The statute was divided into parts in 1938, with the false statement provision remaining unchanged, Act of April 4, 1938, Pub L. No. 75-465, 52 Stat. 197. In 1948 the false claims provision was codified as 18 U.S.C. § 287 (current version at 18 U.S.C. § 287 (1976)), and the false statement provision codified as 18 U.S.C. § 1001. Act of June 25, 1948, Pub. L. No. 80-772, ch. 645, 62 Stat. 683. The "in any matter within the jurisdiction" clause was moved to the beginning of the latter provision, but no changes of substance were made.

[33] *See, e.g., National Petroleum Refiners Association* v. *Federal Trade Commission*, 482 F.2d 672, 690 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 951 (1974) (Wright, J.) ("where a statute is said to be susceptible of more than one meaning, we must not only consult its language; we must also relate the interpretation we provide to the felt and openly articulated concerns motivating the law's framers").

vising student aid program made false statements to university in order to obtain monetary reimbursement from university account funded by HEW). Protecting the federal treasury has historically been the primary focus of the false statement statute, and it is proper to give the statute a construction that will fulfill this objective. Moreover, application of § 1001 to this particular category of statements made to private parties does not threaten to enlarge the statute beyond reasonable bounds, for the false statement must relate to a pecuniary claim against the federal government.

It is quite another thing, however, to extend § 1001 to any false statement made by one private party to another that finds its way into a report or record submitted by the latter to the government. In a day when records must be submitted to the government on such a wide variety of subjects, this interpretation could result in an enormous expansion of the statute. As Judge Hufstedler has observed in another context, "[e]xtension of section 1001 to its literal breadth . . . cannot be justified by its legislative history." *United States* v. *Bedore*, 455 F.2d 1109, 1110, (9th Cir. 1972) (statute does not apply to giving of false name to FBI agent). That history shows that the 1934 amendments were intended to cover documents submitted to the federal government, whether or not a claim for federal funds is involved. There was no intention to reach statements made to private parties.[34]

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[34] The court of appeals' extension of § 1001 is not only unjustified by the legislative history; it would also create an anomaly in the penalties prescribed by the federal criminal law. If the interpretation adopted below were good law, many statements between private parties would be subject to penalties as severe as those provided for perjurious testimony under oath in a court of law. *See Friedman* v. *United States*, 374 F.2d 363, 366 & n.1 (8th Cir. 1967).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.[35]

Respectfully submitted,

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[35] Four days ago an event occurred that dramatized the continuing importance of the question whether the government can use Title 18 to prosecute the miscertification of "old" oil as "new" oil. On October 29th, Attorney General William French Smith announced that a federal grand jury in Tulsa, Oklahoma, returned a 17-count indictment charging one Robert B. Sutton, owner of BPM, Ltd. and Scurry Oil Company, of making false certifications resulting in overcharges of two to four *billion* dollars. The indictment alleges violations of various provisions of Title 18; as in this case, the government chose not to proceed under the criminal provisions of the EPAA. *See* Indictment, *United States* v. *Sutton* (N.D. Okla., Oct. 29, 1981); Department of Justice, Press Release, October 29, 1981. *See also* note 25 *supra*.

Appendix

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81-828

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

THE CRUDE COMPANY AND JOHN ALLEN MASEK,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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APPENDIX
TABLE OF CONTENTS

	Page
Opinion of the Court of Appeals, May 19, 1981	1a
Opinion of the Court of Appeals on Petitions for Rehearing and Rehearing *en banc*, September 4, 1981	18a
Order of the District Court, July 25, 1979	20a
Transcript of Proceedings in the District Court, July 24, 1979	21a
Order of the Court of Appeals, September 22, 1981	28a
Order of the Court of Appeals, Oct. 8, 1981	30a
Constitution:	
United States Constitution, Fifth Amendment	32a
Statutes:	
12 U.S.C. § 1904 note	33a
15 U.S.C. § 754	33a
18 U.S.C. § 1001	35a
18 U.S.C. § 1341	36a
18 U.S.C. § 1962	37a
Regulations:	
10 C.F.R. § 212.131	38a
10 C.F.R. § 205.202	43a
Indictment	44a
Letter of the Secretary of the Interior	78a

APPENDIX

[OPINION OF THE COURT OF APPEALS, MAY 19, 1981]

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

May 19, 1981

Nos. 79-2488, 79-3082

UNITED STATES OF AMERICA,
Plaintiff-Appellant,

v.

UNI OIL, INC., THOMAS M. "MICK" HAJECATE, THOMAS H. "TOM" HAJECATE, JAMES E. FISHER, CHARLES R. AKIN, CHARLES GOSS and BALL MARKETING ENTERPRISE,
Defendants-Appellees.

UNITED STATES OF AMERICA,
Plaintiff-Appellant,

v.

MID-ATLANTIC PETROLEUM COMPANY, LTD., *et al.*,
Defendants-Appellees.

Appeals from the United States District Court
for the Southern District of Texas

Before HILL, RUBIN and ANDERSON, Circuit Judges

JAMES C. HILL, Circuit Judge:

Under regulations adopted by the Department of Energy, *see* 10 C.F.R. §§ 212.1-212.188(1980),[1] vendors of domestic crude oil operate subject to various price controls. This appeal is a consolidation of two cases in which appellee oil dealers were indicted for various fraudulent schemes and practices which allegedly enabled them to sell domestic crude oil for prices in excess of legal maxima.[2] *See* 10 C.F.R. § 212.131 (1980).

Although the indictments exclusively charge Title 18 offenses, both the indictments and the defenses thereto make use of the Emergency Petroleum Allocation Act (EPAA) 15 U.S.C. § 751 *et seq.* and its regulations. The tension between Title 18 and the EPAA poses difficult questions regarding our jurisdiction and the sufficiency of the indictments. The district court dismissed both indictments. For the reasons set out below, we conclude that we have jurisdiction to consider this appeal and that both indictments are sufficient. Therefore, we reverse and remand to the district court.

I. *The Indictments*

On March 7, 1979, a grand jury in Houston, Texas returned an eighty-four count indictment against Uni Oil, Ball Marketing Enterprise and five named individual defendants, Thomas "Mick" Hajecate, Thomas "Tom" Hajecate, James Fisher, Charles Akin, and Charlie Goss.

---

[1] For convenience, we cite the applicable regulations that were in effect until January 28, 1981. *See* 46 Fed.Reg. 9909 (1981). The instant case actually involves ancestor provisions, since amended.

[2] The price at which domestic crude oil may lawfully be sold depends *inter alia* on its origin. As resellers, appellees were obliged to "certify" that the oil they traded came from "old" or "new" wells since different ceiling prices applied to each. The gravamen of the Government's charge is that appellees purchased "old" oil and resold it as "new," willfully using fraudulent means to miscertify it in the process.

United States v. Uni Oil, Inc., No. 79-2488 (hereinafter *Uni Oil*). The indictment charged that the defendants conspired to violate the Racketeer Influenced and Corrupt Organizations (RICO) statute in order to miscertify and sell oil that was properly considered "old" oil as "new" oil, 18 U.S.C. § 1962(d) [Count 1], conducted the affairs of an enterprise, Uni Oil, through a pattern of racketeering activity which included mail fraud and commercial bribery, 18 U.S.C. § 1962(c) [Count 2], furthered a scheme and artifice to defraud the United States and its agencies through mailings which fraudulently certified "old" oil as "new" oil, 18 U.S.C. § 1341 [Counts 3-34], engaged in wire fraud to further the same scheme and artifice, 18 U.S.C. § 1343 [Counts 35-59], and made false and fraudulent representations regarding the origin of oil in records caused to be prepared and submitted pursuant to government regulation. 18 U.S.C. § 1001 [Counts 60-84].

The appellees challenged the indictment on numerous grounds. After extensive briefing, a hearing was held before the Honorable Ross N. Sterling of the United States District Court for the Southern District of Texas on May 29, 1979. At the close of argument, Judge Sterling announced that the appellees' motions to dismiss were granted. One week later the judge issue a one sentence order dismissing the indictment. Despite the complexity of the issues, the order was not accompanied by a memorandum or by any other anaylsis by the district judge.

On April 30, 1979 a grand jury in Houston, Texas returned a twenty-nine count indictment against the Mid-Atlantic Petroleum Company, Ltd., The Crude Company, Uni Oil, Inc., H.C. Iran, Ltd. and five named individuals, John Allen Masek, Thomas "Tom" Hajecate, Thomas "Mick" Hajecate, Charles R. Akin, and R. Stanley Corbitt. *United States v. Mid Atlantic Petroleum Co., Ltd.*, No.

79-3082 (herinafter *Mapco*). The indictment charged that the defendants conspired to conduct the affairs of an enterprise, Uni Oil, through a pattern of racketeering activity in order to disguise oil that was properly to be considered "old" oil as "new" oil, 18 U.S.C. § 1962(d) [Count 1], conducted the affairs of Uni Oil through a pattern of racketeering activity, 18 U.S.C. § 1962(c) [Count 2], caused false and fraudulent invoices and certificates to be placed in the mail 18 U.S.C. § 1341 [Counts 3-23], and knowingly made false and fraudulent representations in a matter within the jurisdiction of the Federal Energy Administration, *i.e.*, falsely certifying domestic crude oil, 18 U.S.C. § 1001 [Counts 24-29].

As in *Uni Oil*, the appellees challenged the indictment on numerous grounds. After extensive briefing, oral argument was held before the Honorable Ross N. Sterling of the United States District Court for the Southern District of Texas. From the bench, Judge Sterling ordered dismissal of the indictment for "the reasons stated in the Defendants' briefs." On July 25, 1979, Judge Sterling issued a written order granting the motions to dismiss "for the reasons set out in the Defendants' briefs."

II. *Discussion*

A. *Jurisdiction*

The threshold question is whether we have jurisdiction to consider this appeal. Section 211(b)(2) of the Economic Stabilization Act of 1970 provides that the Temporary Emergency Court of Appeals shall have "exclusive jurisdiction of all appeals from the district courts of the United States in cases and controversies arising under this title or under regulations or orders issued thereunder." 12 U.S.C. § 1904 note (West Supp. 1977) Section 5(a)(1) of the Emergency Petroleum Allocation Act, as amended, 15 U.S.C. § 754, incorporates and carries forward this grant of special jurisdiction. Accordingly, if the district court adjudicated an EPAA issue

we lack jurisdiction. *Coastal States Marketing, Inc. v. New England Petroleum Corp.*, 604 F.2d 179, 187 (2d Cir. 1979).

We begin by noting that an EPAA issue is not raised simply because the indictments "included an explanation of the EPAA regulations proscribing miscertification and that such regulations provided a convenient format for defendants' [alleged] scheme of fraud and criminal enterprise," *United States v. Zang*, 645 F.2d 999 at 1003 (Em.App. 1981). However, the thrust of appellees' argument is not that the indictment arose under the EPAA. Rather, they contend that two EPAA issues were raised in defense to the indictment. *See Coastal States Marketing, Inc. v. New England Petroleum Corp.*, 604 F.2d 179 (2d Cir. 1979). First, they argue that the EPAA regulations "upon which the charges were predicated" are unconstitutionally vague. Second, they argue that the EPAA preempted certain Title 18 provisions as they might have otherwise applied to the allegations in the indictment. *See* Post Argument Brief of Appellees The Crude Company and Masek at 2. Appellees urge that the above issues require a constitutional construction of the EPAA; hence, both the letter and spirit of § 211(b)(2) are served by transferring this case to TECA. *See United States v. Wickland*, 619 F.2d 75 (Em.App. 1980). Appellees excellent briefs present a forceful argument. Nonetheless, a close examination of the character of the issues presented reveals that none of them arise under the EPAA.

B. *Jurisdiction and Vagueness*

An analysis of the appellees' defenses can not be conducted without reference to the indictments. Considering the indictments themselves, not the ones the defendants seek for us to image in their stead, there is no charge of a violation of EPAA regulations. The crimes charged vary with each count, but Count 3 of No. 79-

2488 will serve as an example. The issue under Count 3 is whether Invoice # 147, mailed to Mid-Atlantic Petroleum Company from one of the co-defendants, Uni Oil, on July 22, 1976, contained untrue representations, made knowingly and with intent to defraud, as part of the scheme alleged in the indictment. In the absence of the existence of the EPA or of any EPAA regulations, it would presumably be a criminal act to use the mails as part of a scheme to defraud by falsely certifying facts relating to the provenance of oil knowingly and with intent to defraud. What makes the act criminal is not the regulation, but the use of the mails to carry an untrue document fabricated with fraudulent purpose.

If the description of "old" and "new" oil, wherever set forth, whether in regulations or technical literature, is so vague that no one can tell one from the other (or if, as put by the defendants, they do not provide "fair notice" of that difference between "old" and "new" oil), evidence to that effect and the arguments of counsel might persuade a jury that the defendants did not knowingly make a false statement or lacked intent to defraud or otherwise did not violate the statute upon which the indictment is based. On appeal, the defendants phrase this issue as "whether the regulations are uncontitutionally vague." Thus, they assert, the constitutionality of the regulations is at issue and only TECA has jurisdiction.

This contention is subtly different from their contention in the district court. Below they contended that "FEA's Crude Oil Certification Regulations Cannot be the Basis for Criminal Prosecution Unless they Provided 'Fair Notice' of What Conduct was Required." "Because of this lack of fair notice, the Due Process Clause prohibits criminal prosecution of the defendants for violating the certification regulations." This was not an attack on constitutionality of the regulations *per se* but on the constitutionality of prosecuting a person for conduct

that was made criminal without fair notice. That issue does not require resolution of the constitutionality or even the interpretation of the regulations; only whether the criminal statutes clearly prescribed the conduct charged.

In *United States v. Weatherspoon*, 581 F.2d 595 (7th Cir. 1978), the defendant was convicted under the RICO, mail fraud, and false statements statutes (the same statutes involved here). She claimed that the certification she was alleged to have falsely made were too ambiguous to support a false statements prosecution because they did not adequately set out what information she was required to supply. The Seventh Circuit rejected that conclusion, but rested in part on a construction of the certification requirement. "Moreover, even if we agreed with *Weatherspoon* that the language is not a model of clarity, we note that the 'vagueness' argument was open to *Weatherspoon* at trial, for the Government was required under 18 U.S.C. § 1001 to establish not only that the certification was false, but also that *Weatherspoon* had made the certification *knowing* it to be false." 581 F.2d at 601 (emphasis in original).

Although the TECA has defined its "arising under" jurisdiction broadly, to include all EPAA issues, it has drawn a distinction between an issue "arising under" the EPAA and one that only peripherally involves a regulation.

In *United States v. Cooper*, 482 F.2d 1393 (Em.App. 1973), the defendant was charged with violations of rent control regulations and with violations of the false statement statute, 18 U.S.C. § 1001 (one of the statutes invoked against the present defendants). He appealed to the Ninth Circuit and that court transferred the case to TECA. TECA took jurisdiction over the charges of violation of regulations, but treated the transfer as an untimely notice of appeal and dismissed the appeal. It

concluded, however, that the false statement charge did not arise under the statute and was not within the appellate jurisdiction of TECA, even though it involved false statements on forms required by ESA regulations. "We start with the premise that a conviction under 18 U.S.C. § 1001 would be appealable only to a court of appeals, under 28 U.S.C. § 1291, unless the Stabilization Act provides otherwise . . . . We do not think that Count 1 being based on 18 U.S.C. § 1001, was a controversy "arising under any title of the Stabilization Act or under regulations or orders issued therunder." *Id.* at 1397.

Thus, the mere fact that a criminal conviction may rest on a false statement made while engaging in a business regulated by EPAA or ESA, does not of itself place the action within TECA's jurisdiction. The case or controversy itself must arise under the statute or regulations; the resolution of the issue must turn on proper interpretation of EPAA or ESA. Moreover, some initial determination of the scope of the EPAA or ESA regulations is necessary to determine who has jurisdiction. In *Cooper*, TECA had to determine that 18 U.S.C. § 1001 stated an offense separate and exclusive of ESA issues before it could determine that it lacked jurisdiction.

The ruling in *Bray v. United States*, 423 U.S. 73, 96 S.Ct. 307, 46 L.Ed.2d 215 (1975) was based on similar logic. In *Bray* the defendant was convicted of criminal contempt for failure to comply with a district court order to respond to an IRS subpoena issued pursuant to ESA. He appealed to the circuit court and it dismissed, holding that the appeal should be to TECA. The Supreme Court reversed:

> The Act does not contain any provision prohibiting the violation of a district court's enforcement order or establishing penalties for such a violation . . . . Review in the TECA of criminal contempt convictions relating to compliance investigations or en-

> forcement efforts is not necessary to assure uniform interpretation of the substantive provisions of the stabilization scheme.

423 U.S. at 75, 96 S.Ct. at 309.

Bray cited and expanded upon the holding in *Cooper*. The mere fact that a prosecution involves duties created by the ESA or EPAA is not decisive concerning who has jurisdiction. The crucial question is whether the case involves issues that must be decided by TECA in order that "uniform interpretation of the substantive provisions of the" statute may be achieved. *Bray* involved no such issues because the validity of the contempt charge "was not dependent on the existence of [ESA] violations or even the continuation of the [ESA] investigation." *Id. See also United States v. Vixie*, 532 F.2d 1277 (9th Cir. 1976).

This line of reasoning was further strengthened by the TECA's recent decision in *United States v. Zang*, 645 F.2d 999 (Em.App. 1981). The indictment in *Zang* was substantially similar to the one here. The defendants were charged under certain general criminal statutes for allegedly devising a fraudulent scheme through the use of their companies and the mail and wire communications, whereby they could resell "old" crude oil at "new" or "exempt" oil prices.

The defendants' motions to dismiss contended, *inter alia*, that 15 U.S.C. § 754 preempted the general criminal statutes of Title 18 and that the government was engaging in selective prosecution. The district court denied the defendants' motions. Defendants then sought a writ of mandamus from TECA ordering the trial court to sustain their motions to dismiss the indictment.

Relying extensively on *Cooper* and *Bray*, TECA concluded that the EPAA, as amended, does not "provide for or mention any of these grave (Title 18) felony offenses,

and this Court has no jurisdiction of this appeal." At 1003. TECA's conclusion, quoted from *Bray*, has equal force here:

> This judicial-review provision was designed to provide speedy resolution of cases brought under the Act and 'to funnel in to one court all the appeals arising out of the District Courts and thus gain in consistency of decision.' S.Rep. No. 92-507, p. 10 (1971), U.S. Code Cong. & Admin. News 1971, pp. 2283, 2292.
>
> Nothing in the Act or in its legislative history indicates that Congress intended 'to include existing offenses, already covered under Title 18, under the umbrella of the Stabilization Act.' *United States v. Cooper*, 482 F.2d 1393, 1398 (TECA 1973). Review in the TECA of criminal contempt convictions relating to compliance investigations or enforcement efforts is not necessary to assure uniform interpretation of the substantive provisions of the stabilization scheme. Indeed, a requirement of such review would only serve to undermine the prompt resolution of Stabilization Act questions by burdening the TECA with additional appeals.

423 U.S. at 74-75, 96 S.Ct. at 308-309.

Appellees correctly point out that *Zang* did not decide the identical issues presented by this case. The focus in *Zang* was on "the felony offenses charged in the indictment," at 1003, rather than the defenses raised by the defendant. But this difference is irrelevant here. The appellees' defenses, like the charges in *Cooper*, *Bray* and *Zang*, simply do not require interpretation of the substantive provisions of the EPAA.

We do not take a constricted view of TECA jurisdiction. TECA is vested with jurisdiction over any EPAA issue adjudicated by a district court whether or not the action can be said to arise under EPAA in the constitu-

tional sense. However, not every case that in some manner involves the EPAA necessarily raises EPAA issues.[3]

In sum the defenses raised by the appellees do not involve "interpretation of the substantive provisions" of the EPAA. They involve interpretation of the proper scope of the criminal code statutes under which the defendants were charged.[4]

C. *Jurisdiction and "Preemption"*

The defendants contend also that the EPAA preempts application of the general criminal statutes to conduct regulated by EPAA. This claim is also within our jurisdiction.

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[3] Relying heavily on *United States v. Wickland*, 619 F.2d 75 (Em.App. 1980), appellees urge us to characterize any issue "interwoven with" an analysis of the EPAA as an EPAA issue. Close examination shows, however, that *Wickland* supports a more stringent standard in order to find an EPAA issue. In *Wickland*, the government sought to enforce a subpoena issued pursuant to the EPAA. The defendant urged that the government should be equitably estopped from enforcing the subpoena. The court characterized the issue as "a federal agency's attempt to fulfill its duty under statutes and regulations over which this court (TECA) has exclusive jurisdiction." *Id.* at 78. It found that "[a]ny 'general questions of administrative law' are clearly interwoven with provisions of the ESA and EPAA *and involve policy questions directly affecting the EPAA and its enforcement.*" *Id.* at 79 (emphasis added). *Wickland* stands in sharp contrast to this case. Here, there are no "policy questions directly affecting the EPAA." Nor is a federal agency acting pursuant to statute and regulations over which TECA has exclusive jurisdiction. Rather, the United States Attorney has indicted the defendant for criminal offenses under Title 18.

[4] Appellees' argument that an individual director, officer, or agent cannot be imprisoned for more than a year "unless he also has knowledge or reasonably should have known of notice of noncompliance received by the corporation from the President" 15 U.S.C. § 754 is inapplicable since defendants are charged with Title 18 offenses, not violations of the EPAA.

In *United States v. Vixie*, 532 F.2d 1277 (9th Cir. 1976), the defendant contended that his false statement conviction was invalid because he should have been charged under the provisions of ESA dealing with compelling compliance with subpoenas. The circuit court, rather than submitting that question of preemption to TECA, concluded that nothing in ESA suggested that its compliance provisions were the exclusive remedy for failure to comply and that the defendant did not simply fail to comply, she falsely complied; the court therefore concluded that there were no preemption.

In *United States v. Gilliland*, 312 U.S. 86, 61 S.Ct. 518, 85 L.Ed. 598 (1941), the Supreme Court considered whether provisions of the Hot Oil Act, 15 U.S.C. §§ 715-715(d), (requiring affidavits concerning the amount of oil shipped from wells) preempted prosecutions under the predecessor of 18 U.S.C. § 1001 for false statements on affidavits even though the regulations may have been violated as well. The question was not phrased as an issue involving the interpretation of the regulations, but as an issue involving the interpretation of the scope of the criminal statute. The court held that the provisions of the general false statements statute were not limited to the enforcement of the "hot oil" regulations and that the later "hot oil" act did not repeal the earlier general statute so far as the latter applied to "hot oil" documents. The statutes were complimentary, not exclusive. *See also United States v. Carter*, 526 F.2d 1276 (5th Cir. 1976) (determining that the false statement provisions of 15 U.S.C. § 645(a) do not preempt 18 U.S.C. § 1001, even though they may both reach false statements on SBA forms. 18 U.S.C. § 1001 requires proof of elements not required by the other statute).

Because the preemption issue concerns only the EPAA's effect on an unrelated criminal statute, "[r]eview in the TECA . . . is not necessary to assure uniform interpre-

tation of the *substantive* provisions of the stabilization scheme." *Bray v. United States*, 423 U.S. at 75, 96 S.Ct. at 309 (emphasis added). *Bray* also cautions us to avoid burdening the TECA with additional appeals, so that the TECA will not be prevented from promptly deciding appeals involving substantive provisions of the regulatory schemes. *Id.* Accordingly, we should not construe a peripheral issue as "arising under" the EPAA.[5]

D. *Further Challenges to the Indictments*

Appellees' remaining points, which should have been disposed of by the district court, require little discussion.

Appellees challenge the government's use of the Racketeer Influenced and Corrupt Organizations statute, 18 U.S.C. § 1961 *et seq.* on essentially two grounds. First, they contend that RICO's language is unconstitutionally vague. *See Grayned v. City of Rockford*, 408 U.S. 104, 92 S.Ct. 2294, 33 L.Ed.2d 222 (1972). Second, they argue that the indictments fail to state an offense because they, the defendants, are not members of organized crime, the explicit target of RICO.

Appellees vagueness argument focuses on the definition of "racketeering activity." 18 U.S.C. § 1961. We must cut short appellees proposed tour of the RICO statute because they lack standing to undertake it. *See Association of Data Processing Service Organizations v. Camp*, 397 U.S. 150, 152-153, 90 S.Ct. 827, 829-830, 25 L.Ed.2d 184 (1970). The "racketeering activity" for which the

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[5] Although we have found that the question presented here is not properly cast as one of preemption, we note that TECA has held that the Title 18 offenses in the instant indictments are not preempted by 15 U.S.C. § 754. *United States v. Zang*, 645 F.2d 999 (Em.App. 1981). *See Mobile Oil Corp. v. Tully*, 639 F.2d 912 (2d Cir. 1981) (resolution of whether New York state tax on gross receipts of oil companies doing business in New York was preempted by EPAA transferred to TECA because a thorough and careful examination of the EPAA was required).

Uni Oil defendants were indicted consisted of conspiracy and substantive "violations of the Mail Fraud Statute as charged in Counts Three through Thirty-four . . . and violation of the State of Texas Commercial Bribery Statute." Contrary to appellees professed bafflement, both the language of the indictment charging racketeering and the sections of the statute from which it is drawn are composed of easily understood terms. The language is more than sufficient "to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute." *United States v. Harriss*, 347 U.S. 612, 617, 74 S.Ct. 808, 811, 98 L.Ed. 989 (1954).

In order to dismiss an indictment for failure to state an offense we must find that the indictment does not "contain[] the elements of the offense intended to be charged." *Russell v. United States*, 369 U.S. 749, 763, 82 S.Ct. 1038, 1046, 8 L.Ed.2d 240 (1962), *United States v. Meacham*, 626 F.2d 503, 507 (5th Cir. 1980). Although the legislative history of RICO vividly demonstrates that it was primarily enacted to combat organized crime, nothing in that history, or in the language of the statute itself, expressly limits RICO's use to members of organized crime. Stated differently, membership in organized crime is not a necessary element of a RICO conviction. Accordingly, appellees' argument on this point fails.

Appellees also allege that the government has engaged in selective prosecution.

> To support a defense of selective or disc[r]iminatory prosecution, a defendant bears the heavy burden of establishing, at least *prima facie*, (1) that, while others similarly situated have not generally been proceeded against because of conduct of the type forming the basis of the charge against him, he has been singled out for prosecution, and (2) that the government's discriminatory selection of him for

> prosecution has been invidious or in bad faith, i.e., based upon such impermissible considerations as race, religion, or the desire to prevent his exercise of constitutional rights. These two essential elements are sometimes referred to as 'intentional and purposeful discrimination.'

United States v. Johnson, 577 F.2d 1304, 1308 (5th Cir. 1978). In a sentence, this "heavy burden" has not been carried by the defendants. Of course, our conclusion does not prohibit them from further developing the record to support their contentions.

The *Uni Oil* appellees also contend that count 1 is defective for failing to delineate the elements of commercial bribery. An indictment is sufficient if it clearly informs the defendant of the precise offense of which he is accused so that he may prepare his defense and if it states facts adequate to permit the defendant to plead former jeopardy in a subsequent prosecution. *Russel v. United States*, 369 U.S. 749, 763-64, 82 S.Ct. 1038, 1046-47, 8 L.Ed.2d 240 (1962). Futhermore, as the Supreme Court has explained, the sufficiency of an indictment "is not a question of whether it *could* have been more definite and certain." *United States v. Debrow*, 346 U.S. 374, 378, 74 S.Ct. 113, 115, 98 L.Ed. 92 (1953) (emphasis added). Although we do not condone the government's sloppiness, we find the indictment passes the test outlined above. Despite the government's failure to allege each element of commercial bribery separately, the indictment contains copious facts which adequately apprise the defendants of the nature of the charge against them. Therefore, the indictment's deficiency is not material. *See United States v. Ylda*, 643 F.2d 348 at 352 (5th Cir. 1981).

The *Mapco* appellees also urge that counts 1 through 23 are duplicitous because in addition to charging RICO and mail fraud violations, each count also charges the ad-

ditional offense of conspiracy to defraud the United States, 18 U.S.C. § 371. A duplicitous indictment charges two or more distinct offenses in a single count. *Bins v. United States*, 331 F.2d 390 (5th Cir.), *cert. denied*, 397 U.S. 880, 85 S.Ct. 149, 13 L.Ed.2d 87 (1964), Fed.R. Crim.P. 8(a).

A straightforward reading of the indictment rebuts appellees' effort to interject § 371 conspiracies into counts 1-23 through a hypertechnical reading of selected parts of the various counts. Counts must be read as a whole to determine their meaning. *See United States v. Markham*, 537 F.2d 187, 192 (5th Cir. 1976), *cert. denied*, 429 U.S. 1041, 97 S.Ct. 739, 50 L.Ed.2d 752 (1977). The dangers of duplicity, that it will be impossible to determine what the jury has found and that the defendants may be subject to double jeopardy in the event of a subsequent prosecution, are not present in this case. *Bins v. United States*, 331 F.2d 390, 393 (5th Cir.), *cert. denied*, 397 U.S. 880, 85 S.Ct. 149, 13 L.Ed 87 (1964). Unlike *Bins* in which the defendant was charged with two separate acts of false uttering in the same count, only one violation is charged in each count here. Count 1 charges a RICO conspiracy, count 2 a substantive RICO violation, and counts 3-24 each rely on a separate mailing in charging mail fraud.

Next, *Mapco* appellees contend that the mailings in counts 3-18 were simply routine, regularly employed mailings and hence cannot form the basis for mail fraud charges. *See United States v. Tarnopol*, 561 F.2d 466, 472 (3d Cir. 1977). The record, as developed to date, does not support this view of the mailings. Rather, the indictment clearly charges that the mailings were used "for the purpose of executing" a scheme or artifice to defraud. *See Parr v. United States*, 363 U.S. 370, 80 S.Ct. 1171, 4 L.Ed.2d 1277 (1960). If the appellees

develop this argument at trial they may have valid grounds for a motion for judgment of acquittal.

Finally, *Mapco* appellees contend that counts 24-29 fail to state an offense under 18 U.S.C. § 1001 because they refer only to statements made to a private purchaser. Section 1001 requires that the false statement be made in a "matter within the jurisdiction of any department or agency of the United States." 18 U.S.C. § 1001 (West 1976). This jurisdictional requisite has been satisfied.

The allegedly false certifications of defendants were relied on by refiners who prepared records which were ultimately submitted to the FEA. 18 U.S.C. § 1001 is designed to protect federal funds and functions from fraudulent interference. In order to achieve this objective, it is well settled that a false statement need not be made directly to a federal agency in order to sustain a § 1001 conviction. *United States v. Baker*, 626 F.2d 512, 514 (5th Cir. 1980), *United States v. Hooper*, 596 F.2d 219 (7th Cir. 1979). Here, the defendants' certifications ultimately made their way to the FEA and thus, if fraudulent, caused the precise harm § 1001 was enacted to abolish.

We find no merit in appellees' remaining arguments. Accordingly, the judgment of the district court is reversed and remanded for proceedings consistent with this opinion.

REVERSED and REMANDED.

[OPINION OF THE COURT OF APPEALS, SEPTEMBER 4, 1981]

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

Sept. 4, 1981

Nos. 79-2488, 79-3082

UNITED STATES OF AMERICA,
Plaintiff-Appellant,

v.

UNI OIL, INC., THOMAS M. "MICK" HAJECATE, THOMAS H. "TOM" HAJECATE, JAMES E. FISHER, CHARLES R. AKIN, CHARLES GOSS and BALL MARKETING ENTERPRISE,
Defendants-Appellees.

UNITED STATES OF AMERICA,
Plaintiff-Appellant,

v.

MID-ATLANTIC PETROLEUM COMPANY, LTD., *et al.*,
Defendants-Appellees.

Appeals from the United States District Court
for the Southern District of Texas

ON PETITIONS FOR REHEARING AND
PETITIONS FOR REHEARING EN BANC

(5th Cir. 1981, 646 F.2d 946)

Before HILL, RUBIN and ANDERSON, Circuit Judges

PER CURIAM.

Pursuant to a review of the Appellee's briefs we strike the penultimate paragraph and replace it with the following.

The indictment sufficiently charges that the allegedly false certificates of defendants were relied on by refiners who prepared records which ultimately influenced FEA calculations. 18 U.S.C. § 1001 is designed to protect federal funds and functions from fraudulent interference. In order to achieve this objective, it is well settled that a false statement need not be made directly to a federal agency in order to sustain a § 1001 conviction. *United States v. Baker*, 626 F.2d 512, 514 (5th Cir. 1980); *United States v. Hooper*, 596 F.2d 219 (7th Cir. 1979). If, however, subsequently developed evidence shows that the certification in question did not influence FEA calculations, either directly or indirectly, the Appellees may have valid grounds for a motion for judgment of acquittal on these grounds.

With the above observations, the Petitions for Rehearing are DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16) the Petitions for Rehearing En Banc are DENIED.

[640]

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

Criminal Case No. H-79-62

UNITED STATES OF AMERICA,
Plaintiff,

v.

MID-ATLANTIC PETROLEUM COMPANY, LTD., *et al.*,
Defendants.

(Filed July 25, 1979)

ORDER

Came on for hearing Defendants' motion to dismiss the indictment and the Court having considered said motion and the Government's response hereby

ORDERS that Defendants' motion to dismiss the indictment shall be GRANTED for the reasons set out in Defendants' briefs.

DONE at Houston, Texas, this 25th day of July, 1979.

ROSS N. STERLING
United States District Judge

* * * *

[1]

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

Criminal Case No. H-79-62

UNITED STATES OF AMERICA,
Plaintiff,

v.

MID-ATLANTIC PETROLEUM COMPANY, LTD., *et al.*,
Defendants.

(Filed August 1, 1979)

TRANSCRIPT OF PROCEEDINGS

Before: Honorable Ross N. Sterling, District Judge

Houston, Texas

July 24, 1979

Appearing for the Government:

Jim Ezer, AUSA
Richard Sauber, Justice Dept.

Appearing for Uni Oil, Inc.:

Charles Wooten, Esq.
Thano Dameris, Esq.

Appearing for The Crude Co.:

Vincent Fuller
Edward McDonough
Judith Miller

[2]

PROCEEDINGS

July 24, 1979

The Court: We will take up Criminal Action H-79-62, United States of America versus Mid-Atlantic Petroleum Company, Ltd. and others.

Mr. McDonough: Your Honor, may I take this opportunity to introduce out-of-state counsel, Mr. Vincent Fuller and Ms. Judith Miller from the Washington law firm of Williams and Connolly. They will be appearing on behalf of Mr. Masek and The Crude Company.

Mr. Dameris: Your Honor, since this case is virtually identical to H-79-41 which was heard by this Court on May 20, 1979, and since we have incorporated the motions and briefs previously filed in H-79-41 plus supplements, and since none of the defendants requested oral arguments in this matter, we will waive our right to argument and defer to the Government and respond to their arguments, if necessary.

The Court: All right. I have, of course, ruled in the other case, and read the briefs that were filed by all parties in this case, and I am prepared to rule on the various motions at this time unless somebody has something, if the Government wants to add something that is not in the briefs, I will hear from them.

[3]

Mr. Sauber: Your Honor, the Government would like to respond to whatever concerns that Your Honor may have about the validity of the Indictment that is presently before you. Unfortunately, we are at somewhat of a loss to know your areas of question, what areas you think the Indictment on its face is deficient, and we stand ready to respond to any specific concerns you have.

The Court: I think the Indictment is deficient on its face for the reasons stated in the briefs of the defendants.

Mr. Sauber: All of them?

The Court: Not all of them.

Mr. Sauber: If there are any that the Court would like to hear from the Government on, or where the Government has made a mistake on where it is deficient, but a number of reasons have been cited in all of the briefs filed by the defense and we are at a loss as to know where to start.

The Court: You responded to all of them. My main concern, the reason why I am going to grant the motion, is I think the way the Government should proceed in this matter is under the Energy Act.

Mr. Sauber: So your Honor thinks the EPAA preempts the general criminal statute.

The Court: Generally, yes.

[4]

Mr. Sauber: Are there other reasons—

The Court: I don't have to give you my reasons.

Mr. Sauber: I understand, Your Honor, but in an attempt to present the Government's case and to prepare ourselves for future cases, it would be instructive to us to know what areas we have gone beyond the bounds of our legal limits.

The Court: Well, I am going to leave the ruling of the Court that I am granting the Motions to Dismiss for the reasons stated in the Defendants' Briefs.

Mr. Dameris: Your Honor, one other thing, we would like to have a stipulation entered into by and between the Defendant Uni Oil, Mr. Thomas M. "Mick" Hajecate, Mr. Thomas H. "Tom" Hajecate, Charles R. Akin, The Crude Company and Mr. John Allen Masek in regard to the notice provisions of the Act. The stipulation has been signed and it is presently in the possession of the Government, and it is identical, the same language as the

previous stipulation, and we would respectfully ask the Court to admit it in evidence.

Mr. Sauber: May I be permitted to finish? We will be happy to do that in a moment.

In response to Your Honor's concern as to whether the EPAA pre-empts the general criminal statutes, we would cite the unanimous Supreme Court decision

[5]

Batchelder last month, and apparently Your Honor finds that unavailing.

The Court: I understand your position, and the ruling of the Court is the same. The stipulation as to the lack of notice will be admitted in evidence.

Mr. Ezer: May I address the Court? There is one matter I would like to bring to the Court's attention. I understand that the Court intends to grant—

The Court: I didn't indicate that, I granted the Motion to Dismiss.

Mr. Ezer: What I would like to point out currently, the case that was heard before this Court on May 29th is currently before the Fifth Circuit for their review and determination if in fact the Government is correct in proceeding under the RICO Statute. We would offer to the Court for its consideration to hold this case in abeyance. We have asked for an expedited appeal. It is my understanding that perhaps we would receive some word from the Fifth Circuit tomorrow whether the expedited appeal will be granted, or our request for expedited appeal. It is possible that we could have our decision by late fall or early in the year.

We would ask the Court to consider our request at this time and give serious thought to holding this case in abeyance, the Defendants' Motion in Abeyance until we see what the Fifth Circuit does.

[6]

Mr. Fuller: For the defendants Masek and The Crude Company, none of those defendants was in the first case, and to stay this case here, both of those defendants would have no voice in the pending appellate proceeding and we would like to be able to argue the case in the Fifth Circuit.

The Court: I will not stay the case, I will dismiss the indictment.

Mr. Fuller: I would like to ask the Court to accept this affidavit as a pleading—

Mr. Sauber: If Your Honor please, if the indictment has been dismissed, we see no reason why any additional papers out to be submitted that the Government has not had a chance to respond to.

The Court: Well, I am not finding any facts, so I don't need any affidavits, so I am not going to accept that.

Mr. Sauber: Just one further point as a matter of information. Does Your Honor anticipate entering a written order?

The Court: I am going to enter an order saying for the reasons stated in the defendants' Motions the Indictment is dismissed.

Mr. Sauber: That will be a written order?

The Court: Yes.

[7]

Mr. Dameris: May we have the Government please execute the Stipulation.

The Court: Have you all any objection to the stipulation that there has been no notice?

Mr. Ezer: No, Your Honor. The only objection we have with regard to the stipulation, there is an additional two parties named, that being Mid-Atlantic Petroleum and H. C. Iran. On the stipulation that the gov-

ernment proposes and gave to the defense, we had spaces for H. C. Iran and Mid-Atlantic to sign, and we also included spaces for the additional defendants to sign. It is my understanding from Mr. Dameris he does not wish to sign that because our stipulation contains Mid-Atlantic and H. C. Iran. It is their agreement, I understand, that we can ink in the bottom both H. C. Iran and Mid-Atlantic.

Mr. Dameris: I believe I said I could not execute for and on behalf of Mid-Atlantic and H. C. Iran. We do not represent H. C. Iran. The stipulation has been signed by the defendants, signed by the defendant attorneys, and if they would like to ink in H. C. Iran and Mid-Atlantic and leave it blank, fine. The government is saying that no notice was given to them, but we cannot speak for them.

Mr. Ezer: We are not asking Mr. Dameris to speak to those, but only asking that the names are in the caption and there should be space for them to sign.

[8]

Mr. Dameris: We have no objection.

Mr. Ezer: I would just like to cite several cases, state them for the purpose of the Record, or I can give them to the Court Reporter after court has adjourned.

The Court: Are they something that you have not included in your brief?

Mr. Ezer: They are not in the brief and they speak to the fact that Rico has been given a very broad interpretation. First is U.S. versus Cohen, 444 F.Supp. 1314 where a School Board attorney and School Board member were indicted under Rico.

We would cite to the Court U.S. versus Culbert, 435 U.S. 371 where the Court in that case specifically held that Rico was given a very broad interpretation.

We would also cite to the Court the case of United States versus Campanale, 518 F.2d 352. That speaks also

to the issue that the Rico Statute is given a very broad interpretation. In that case the same argument was made, that the Rico only referred to organized crime and the syndicate and the Mafia, and the Court specifically held that it did not.

The Court: The stipulation is accepted by the Court. The Motions to Dismiss the indictment are granted, and Court is adjourned.

[9]

REPORTER'S CERTIFICATE (Omitted)

* * * *

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT
UNIT A

No. 79-2488 &
79-3082

UNITED STATES OF AMERICA,
Plaintiff-Appellant,
versus

UNI OIL, INC., THOMAS M. "MICK" HAJECATE, THOMAS H. "TOM" HAJECATE, JAMES E. FISHER, CHARLES R. AKIN, CHARLES GOSS and BALL MARKETING ENTERPRISE,
Defendants-Appellees.

(Filed Sept. 22, 1981)

Appeal from the United States District Court
for the Southern District of Texas

ORDER

☐ The motions of appellees' JAMES E. FISHER, JOHN ALLEN MASEK & CRUDE CO. for stay of the issuance of the mandate pending petition for writ of certiorari is DENIED. See Fifth Circuit Local Rule 17, as amended January 22, 1979.

☒ The motions of appellees' FISHER, MASEK and THE CRUDE COMPANY for stay of the issuance of the

mandate pending petition for writ of certiorari is GRANTED to and including October 4, 1981, the stay to continue in force until the final disposition of the case by the Supreme Court, provided that within the period above mentioned there shall be filed with the Clerk of this Court the certificate of the Clerk of the Supreme Court that the certiorari petition has been filed. The Clerk shall issue the mandate upon the filing of a copy of an order of the Supreme Court denying the writ, or upon the expiration of the stay granted herein, unless the above mentioned certificate shall be filed with the Clerk of this Court within that time.

☐ The motion of _____ for a further stay of the issuance of the mandate is GRANTED to and including _____, under the same conditions as set forth in the preceding paragraph.

☐ IT IS ORDERED that the motion of _____ _____ for a further stay of the issuance of the mandate is DENIED.

/s/ James C. Hill
United States Circuit Judge

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 79-2488 and
79-3082

UNITED STATES OF AMERICA,
Plaintiff-Appellant,

versus

UNI OIL, INC., *et al.*,
Defendants-Appellees.

(Filed Oct. 8, 1981)

Appeal from the United States District Court for the
Southern District of Texas

ORDER

☐ The motion of _____
for stay of the issuance of the mandate pending petition for writ of certiorari is DENIED. See Fifth Circuit Local Rule 17, as amended January 22, 1979.

☐ The motion _____
for stay of the issuance of the mandate pending petition for writ of certiorari is GRANTED to and including _____, the stay to continue in force until the final disposition of

the case by the Supreme Court, provided that within the period above mentioned there shall be filed with the Clerk of this Court the certificate of the Clerk of the Supreme Court that the certiorari petition has been filed. The Clerk shall issue the mandate upon the filing of a copy of an order of the Supreme Court denying the writ, or upon the expiration of the stay granted herein, unless the above mentioned certificate shall be filed with the Clerk of this Court within that time.

☒ The motion of appellees John Allen Masek and The Crude Company for a further stay of the issuance of the mandate is GRANTED to and including November 4, 1981, under the same conditions as set forth in the preceding paragraph.

☐ IT IS ORDERED that the motion of appellees John A. Masek & The Crude Company for a further stay of the issuance of the mandate is DENIED.

/s/ James C. Hill
United States Circuit Judge

UNITED STATES CONSTITUTION, FIFTH AMENDMENT

The Fifth Amendment to the Constitution provides in relevant part as follows:

> "No person . . . shall be compelled in any criminal case to be a witness against himself; nor be deprived of life, liberty, or property, without due process of law . . . ."

STATUTES

12 U.S.C. § 1904 note:

Section 211(b)(2) of the Economic Stabilization Act of 1970, *see* 12 U.S.C. § 1904 note (1976), provided in relevant part:

> "The Temporary Emergency Court of Appeals shall have exclusive jurisdiction of all appeals from the district courts of the United States in cases and controversies arising under this title or under regulations or orders issued thereunder."

15 U.S.C. § 754:

Section 5, Emergency Petroleum Allocation Act, As Amended, 15 U.S.C. § 754 (1976), provides:

> § 754. Administration and enforcement; delegation of authority; civil and criminal penalties
>
> (a)(1) Except as provided in paragraph (2), (A) sections 205 through 207 and sections 209 through 211 of the Economic Stabilization Act of 1970 (as in effect on November 27, 1973) shall appy to the regulation promulgated under section 753(a) of this title, to any order under this chapter, and to any action taken by the President (or his delegate) under this chapter, as if such regulation had been promulgated, such order had been issued, or such action had been taken under the Economic Stabilization Act of 1970; and (B) section 212 (other than 212(b)) and 213 of such Act shall apply to functions under this chapter to the same extent such sections apply to functions under the Economic Stabilization Act of 1970.
>
> (2) The expiration of authority to issue and enforce order and regulations under section 218 of

such Act shall not affect any authority to amend and enforce the regulation or to issue and enforce any order under this chapter, and shall not affect any authority under sections 212 and 213 insofar as such authority is made applicable to functions under this chapter.

(3)(A) Whoever violates any provision of the regulation under section 753(a) of this title, or any order under this chapter shall be subject to a civil penalty—

(i) with respect to activities relating to the production, distribution, or refining of crude oil, of not more than $20,000 for each violation;

(ii) with respect to activities relating to the distribution of residual fuel oil or any refined petroleum product (other than activities entirely at the retail level), of not more than $10,000 for each violation; and

(iii) with respect to activities—

(I) entirely relating to the distribution of residual fuel oil or any refined petroleum product at the retail level, or

(II) activities not referred to in clause (i) or (ii) of subclause (I) of this clause, or not more than $2,500 for each violation.

(B) Whoever willfully violates any provisions of such regulation, or any such order shall be imprisoned not more than 1 year, or—

(i) with respect to activities relating to the production or refining of crude oil, shall be fined not more than $40,000 for each violation;

(ii) with respect to activities relating to the distribution of residual fuel oil or any refined

petroleum product (other than at the retail level), shall be fined not more than $20,000 for each violation;

(ii) with respect to activities relating to the distribution of residual fuel oil or any refined petroleum product at the retail level or any other person shall be fined not more than $10,000 for each violation;

or both.

(4) Any individual director, officer, or agent of a corporation who knowingly and willfully authorizes, orders, or performs any of the acts or practices constituting in whole or in part a violation of paragraph (3), shall be subject to penalties under this subsection without regard to any penalties to which that corporation may be subject under paragraph (3) except that no such individual director, officer, or agent shall be subject to imprisonment under paragraph (3), unless he also has knowledge, or reasonably should have known, of notice of noncompliance received by the corporation from the President.

(b) The President may delegate all or any portion of the authority granted to him under this chapter to such officers, departments, or agencies of the United States, or to any State (or officer thereof), as he deems appropriate.

18 U.S.C. § 1001:

§ 1001. Statements or entries generally

Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent state-

ments or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

18 U.S.C. § 1341:

§ 1341. Frauds and swindles.

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be intimated or held out to be such counterfeit or spurious article, for the purpose of executing any scheme or artifice or attempting to do so, places any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or takes or receives therefrom, any such matter of thing, or knowingly causes to be delivered thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

18 U.S.C. § 1962:

1962. Prohibited activities.

(a) It shall be unlawful for any person who has received any income derived, directly or indirectly from a pattern of racketeering activity or through collection of an unlawful debt in which such person has participated as a principal within the meaning of section 2, title 18, United States Code, to use or

invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of any enterprise which is engaged in, or the activity of which affect, interstate or foreign commerce. A purchase of securities on the open market for purposes of investment, and without the intention of controlling or participating in the control of the issuer, or of assisting another to do so, shall not be unlawful under this subsection if the securities of the issuer held by the purchaser, the members of his immediate family, and his or their accomplices in any pattern or racketeering activity or the collection of any unlawful debt after such purchase do not amount in the aggregate to one person of the outstanding securities of any one class, and do not infer, either in law or in fact, the power to elect not one or more directors of the issuer.

(b) It shall be unlawful for any person through a pattern of racketeering or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection or unlawful debt.

(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsections (a), (b), or (c) of this section.

(Added Pub. L. 91-452, Title IX, § 901(a), Oct. 15, 1970, 84.

REGULATIONS

10 C.F.R. § 212.131:

212.131. Certification of domestic crude oil sales.

(a) (1) *Stripper well properties.* With respect to each stripper well property, the producer shall certify in writing to each purchaser of crude oil produced from that property:

(i) That the property concerned has qualified as a stripper well property; and

(ii) The average daily production per well for the 12 month period during which the property qualified as a stripper well property.

The certification required under this paragraph (a) (1) of this section shall be made (i) within the consecutive two-month period immediately succeeding the month of September 1976, with respect to any property which qualified as a stripper well property during or before the month of September 1976; and (ii) with respect to any property which qualifies as a stripper well property during or after the month of October 1976, within the two month period immediately succeeding the first month that such property qualifies as a stripper well property.

(2) *Non-stripper well properties.* (i) With respect to each sale of crude oil from a property which has not qualified as a stripper well property, the producer shall certify in writing to the purchaser the number of barrels of new crude oil and the number of barrels of old crude oil. With respect to any property which has not qualified as a stripper well property, and from which crude oil is only sold to one purchaser, the requirements of this paragraph (a) (2) (i) of this section may be complied with by a one-time certification to the purchaser of the property's monthly base production control level

determined pursuant to 10 CFR 212.72, whether based upon production and sale of crude oil in 1972 or upon production and sale of old crude oil in 1975, and, if applicable, either the property's adjusted base production control level determined pursuant to 10 CFR 212.76 or the information necessary to compute such adjusted base production control level pursuant to 10 CFR 212.76.

(ii) With respect to each property which has not qualified as a stripper well property, the producer shall certify in writing once to each purchaser of crude oil produced and sold from that property:

(A) The highest posted price at 6 a.m., local time, May 15, 1973, for transactions in that grade of crude oil in that field, or if there was no posted price in that field for that grade of domestic crude oil, the related price for that grade of domestic crude oil which is most similar in kind and quality in the nearest field for which prices were posted; and

(B) The highest posted price on September 30, 1975 for transactions in the particular grade of crude oil in that field in September 1975, or if there was no posted price in that field for that grade of domestic crude oil, the related price for that grade of domestic crude oil which is most similar in kind and quality in the nearest field for which prices were posted.

(iii) The certification required under this paragraph (a) (2) of this section shall be made within the consecutive two-month period immediately following the month of September 1976 or, with respect to any property from which crude oil has not been produced and sold prior to September 30, 1976, the certification required under this paragraph (a) (2)

of this section shall be made within the two-month period immediately following the first month in which crude oil is produced and sold.

(3) *Unitized properties.* (i) With respect to each sale of crude oil from a unitized property for which the producer has determined a unit base production control level, the producer shall certify in writing to the purchaser the number of barrels of new crude oil (if any, and whether "actual new crude oil" or "imputed new crude oil" determined pursuant to 10 CFR 212.75(b)), the number of barrels of old crude oil, and the number of barrels of imputed stripper well crude oil (if any) determined pursuant to 10 CFR 212.75(b). With respect to any unitized property for which the producer has determined a unit base production control level, and from which crude oil is only sold to one purchaser, the requirements of this paragraph (a)(3)(i) of this section may be complied with by a one-time written certification to the purchaser of (A) the monthly unit base production control level determined pursuant to 10 CFR 212.75(b); (B) the amount of imputed new crude oil (if any, determined pursuant to 10 CFR 212.75(b)); and (C) the amount of imputed stripper well crude oil (if any, determined pursuant to 10 CFR 212.75(b)).

(ii) With respect to each unitized property for which the producer has determined a unit base production control level, the producer shall certify in writing once to each purchaser of crude oil produced from the property:

(A) The highest posted price at 6 a.m., local time, May 15, 1973, for transactions in that grade of crude oil in that field, or if there was no posted price in that field for that grade of domestic crude oil, the related price for that grade of domestic crude oil which is most similar in kind and quality

in the nearest field for which prices were posted; and

(B) The highest posted price on September 30, 1975, for transactions in that particular grade of crude oil in that field in September 1975, or if there was no posted price in that field for that grade of domestic crude oil, the related price for that grade of domestic crude oil which is most similar in kind and quality in the nearest field for which prices were posted.

(iii) The certification required under this paragraph (a)(3) of this section shall be made within the consecutive two-month period immediately following the month of September 1976, or, with respect to any unitized property for which a unit base production control level has not been established prior to September 30, 1976, the certification required under this paragraph (a)(3) of this section shall be made within the consecutive two-month period immediately following the first month in which such unit base production control level is established.

(4) *Other domestic crude oils the first sale of which is exempt from this part.* (i) With respect to each sale of crude oil exempt from the provisions of this part, other than crude oil produced from a stripper well property, the producer shall certify in writing once to each purchaser of crude oil produced and sold from that property that the first sale of crude oil produced and sold from that property is exempt from the provisions of this part.

(ii) For purposes of this paragraph (a)(4), domestic crude oil the first sale of which is exempt from the provisions of this part includes U.S.-owned petroleum sold by the Secretary of the Navy under the Naval Petroleum Reserves Production Act of 1976 (Pub. L. 94-258).

(5) *New purchasers.* With respect to any purchaser which has not purchased crude oil from the property (or the unitized property) concerned prior to September 30, 1976, the certifications required under paragraphs (a)(1), (a)(2) and (a)(3) of this section shall be made within the consecutive two-month period immediately following the first month in which such purchaser purchases crude oil from that property or unitized property.

(b)(1) Each seller of domestic crude oil, other than a producer of domestic crude oil covered by paragraph (a) of this section, shall, with respect to each sale of domestic crude oil other than (i) an allocation sale pursuant to § 211.65 of Part 211, or (ii) a sale in which no volumes of domestic crude oil are deemed to have been transferred pursuant to § 211.67(g) of Part 211, certify in writing to the purchaser the respective volumes of and respective per barrel prices for the old crude oil, new crude oil, stripper well crude oil, and other domestic crude oils the first sale of which is exempt from the provisions of this part included in the volume of domestic crude oil so sold. The certification shall also contain a statement that the price charged for the domestic crude oil is no greater than the maximum price permitted pursuant to this part.

(2) Each seller of domestic crude oil, other than a producer of domestic crude oil, shall make the certification required by this paragraph as soon as practicable after receipt of the required certifications from its sellers, but in no event later than 30 days following such receipt, However, if the domestic crude oil is not sold until after the expiration of the thirty-day period, the certification required by this paragraph shall be made within ten days following the sale of the domestic crude oil.

(c) With respect to each allocation sale under § 211.65 of Part 211, the seller shall certify in writing to the purchaser the amount of old crude oil deemed (under the provisions of § 211.67(f) of Part 211) to be included in the volume of crude oil so sold. Such written certification shall be made within 25 days following the month in which the crude oil so sold is delivered to or for the account of the purchaser.

(d) No firm may sell domestic crude oil unless it provides the certification required by this section. No firm may knowingly purchase domestic crude oil for which there is no certification as required by this section; provided, however, that the provisions of this paragraph do not apply to the sale of domestic crude oil to a firm under circumstances of economic or other coercion in which the buyer, because of its need for crude oil, had no reasonable alternative but to purchase the domestic crude oil for which there is no certification, and such firm promptly reports the purchase to the Federal Energy Administration for investigation.

(e) All certifications required by this section shall be in writing, either upon an invoice or billing or by separate instrument, and shall be effective only when delivered to and received by the purchaser of domestic crude oil.

10 C.F.R. § 205.202:

"Any practice that circumvents or contravenes or results in a circumvention or contravention of the requirements of any provision of this chapter or any order issued pursuant thereto is a violation of the FEA regulations stated in this chapter."

[1]

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

Criminal Case No. H-79-62

UNITED STATES OF AMERICA,
Plaintiff,

v.

MID-ATLANTIC PETROLEUM CO., LTD., *et al.*,
Defendants.

(Filed April 30, 1979)

INDICTMENT

THE GRAND JURY CHARGES:

COUNT ONE

1. At all times material to this Indictment and specifically from on or about January 1, 1976, continuing to on or about January 1, 1977:

a. There was in existence the Emergency Petroleum Allocation Act (EPAA) of 1973, Title 15, United States Code, Section 751, *et seq.*, which provided for mandatory allocation of all crude petroleum produced in or imported into the United States.

b. There was also in existence the Domestic Crude Oil Allocation (Entitlements) Program which was promulgated by the Federal Energy Administration, now known as the United States Department of Energy, pursuant to the EPAA of 1973:

c. The objective of the *Entitlements Program* was to effectuate the equitable distribution of low priced "old" crude oil among all sectors of the petroleum industry and assure that domestically refined petroleum products were sold at equitable prices in all regions of the United States.

[2]

d. In order to achieve the equitable distribution of low priced "old" crude oil and to achieve cost equalization, the *Entitlements Program* required an exchange of funds between domestic refiners through the purchase or sale of entitlements.

e. There was also in existence a reporting requirement, pursuant to Federal Energy Administration regulations, which provided that refiners report to the Federal Energy Administration the volumes of "old" and "new" crude oil received by the refiner. The reports received by the Federal Energy Administration from the refiners enabled the Federal Energy Administration to calculate which refiners were required to buy entitlements and which were required to sell entitlements.

f. The refiners' reports to the Federal Energy Administration were based on the certification provided to the refiners by the suppliers of crude oil. The refiners were prohibited from purchasing crude oil without a certification of the volumes of "old" oil and "new" oil.

g. There was also in existence a certification program with regard to the purchase and sale of domestic crude petroleum, pursuant to the Emergency Petroleum Allocation Act of 1973, Title 15, United States Code, Section 751, *et seq.*, and regulations set forth by the Federal Energy Administration, now known as the United States Department of Energy. Those regulations provided in pertinent part:

> Each seller of domestic crude petroleum, . . . shall with respect to each sale of domestic crude petro-

> leum . . . certify in writing to the purchaser the amount of old crude petroleum included in the volume of domestic crude petroleum so sold. The certification shall also contain a statement that the price charged for the domestic crude petroleum is no greater than the maximum price permitted pursuant to this part. Title 10, Code of Federal Regulations, Section 212.131(a)(2).

[3]

This section was amended, effective September 1, 1976, as follows:

> Each seller of domestic crude oil, . . . shall, with respect to each sale of domestic crude oil . . . certify in writing to the purchaser the respective volumes of and respective per barrel prices for the old crude oil, new crude oil, . . . included in the volume of domestic crude oil so sold. The certification shall also contain a statement that the price charged for the domestic crude oil is no greater than the maximum price permitted pursuant to this part. Title 10, Code of Federal Regulations, Section 212.131(b)(1).

h. There was also in existence a regulation requiring firms subject to the Mandatory Petroleum Allocation Program to maintain records to demonstrate that prices charged and the amount sold by firms were in compliance with the Mandatory Petroleum Allocation Program and its regulations and a further requirement that their records be made available upon request to the Federal Energy Administration. Title 10, Code of Federal Regulations, Section 210.92(a)(b).

i. There was also in existence a regulation requiring firms who exchanged crude oil to retail the original regulatory category (i.e., old, new) of the crude oil transferred, thereby preventing the conversion of crude oil from one tier to another via an exchange or series of

exchanges. Title 10, Code of Federal Regulations, Section 211.67(g).

j. As set forth in this indictment, "domestic crude petroleum" also means "domestic crude oil"; "old" crude petroleum means "old oil" or "lower tier" oil; "new" crude petroleum is the same as "upper tier" oil and includes "released oil." The terms "oil" and "petroleum" are used synonymously and have the same meaning.

[4]

2. a. Mid-Atlantic Petroleum Company, Ltd., hereinafter referred to as Mapco, was a Grand Cayman, British West Indies, entity utilized and controlled by THOMAS M. "MICK" HAJECATE and THOMAS H. "TOM" HAJECATE, and was an affiliate of Uni Oil, Inc.

b. H. C. Iran, Ltd., was a Grand Cayman, British West Indies, entity utilized and controlled by THOMAS M. "MICK" HAJECATE and THOMAS H. "TOM" HAJECATE.

c. Uni Oil, Inc., Houston, Texas, was a Texas Corporation engaged in reselling crude oil, and owned by THOMAS M. "MICK" HAJECATE and THOMAS H. "TOM" HAJECATE, and constituted an "enterprise" as defined by Title 18, United States Code, Section 1961 (4), which enterprise was engaged in, and the activities of which affected interstate and foreign commerce.

d. Defendant THOMAS M. "MICK" HAJECATE was President and a Dircetor of Uni Oil, Inc., and an officer, agent and employee of H. C. Iran, Ltd., and Mapco.

e. Defendant THOMAS H. "TOM" HAJECATE was Secretary-Treasurer and a Director of Uni Oil, Inc., and an officer, agent, and employee of H. C. Iran, Ltd., and Mapco.

f. Defendant CHARLES R. AKIN was Vice-President of Uni Oil, Inc. and also negotiated and transacted business on behalf of H. C. Iran, Ltd., and Mapco.

g. Defendant R. STANLEY CORBITT, was an agent and employee of International Petroleum Trading Company, SDAD, LTDA, Houston, Texas, hereinafter referred to as Iptco, which purchased crude oil from Mapco.

h. The Crude Company was a Wyoming corporation with headquarters in Casper, Wyoming, engaged in the purchase and sale of crude oil with Mapco.

[5]

i. Defendant JOHN ALLEN MASEK was an officer and stockholder of The Crude Company.

3. From on or about January 1, 1976, the exact date being unknown to the grand jurors, and continuing through on or about January 1, 1977, in the Houston Division of the Southern District of Texas, and elsewhere, and within the jurisdiction of this Court, Defendants THOMAS M. "MICK" HAJECATE, THOMAS H. "TOM" HAJECATE, CHARLES R. AKIN, R. STANLEY CORBITT, and JOHN ALLEN MASEK, did knowingly, and willfully combine, conspire, confederate and agree together and each with the other, and with other person to the grand jurors known and unknown, to violate Title 18, United States Code, Section 1962(c) of the Racketeer Influenced and Corrupt Organizations Statute.

4. It was a part of the conspiracy that defendants, being employed by and associated with UNI OIL, INC., an enterprise engaged in, and the activities of which affected interstate commerce, agreed to conduct and participate directly and indirectly in the affairs of the said enterprise, through a pattern of racketeering activity, to wit: Racketeering acts as charged in Counts Three through Twenty-Three of this indictment, which are alleged and incorporated in this Count by reference as if

fully set forth herein, in violation of Title 18, United States Code, Section 1962(c).

5. Further, as a part of the conspiracy, defendants devised a scheme and artifice to defraud the United States and agencies thereof, to wit: The Federal Energy Administration, now known as the Department of Energy, of its right to have its programs and regulations pertaining to the allocation of crude oil and certification of domestic crude petroleum sales administered honestly, fairly, impartially and free from deceit, craft, trickery, corruption, dishonesty and fraud. That for the purpose

[6]

of executing such scheme and artifice to defraud it was contemplated by defendants that matters or things would be and were placed in the United States Post Office or authorized depository for mail matter, to be sent and delivered by the United States Postal Service, in violation of the Mail Fraud Statute, Title 18, United States Code, Section 1341.

6. It was part of the conspiracy that Defendants THOMAS M. "MICK" HAJECATE, THOMAS H. "TOM" HAJECATE and CHARLES R. AKIN would use their interest in and control over UNI OIL, INC. to create foreign offshore entities in The Grand Cayman, British West Indies, and causing said foreign entities to enter into agreements for the sale and purchase of crude oil with THE CRUDE COMPANY. Further, as part of the conspiracy, the defendant JOHN MASEK would utilize his interest and control over THE CRUDE COMPANY to contract with the foreign entities MAPCO and H. C. IRAN, LTD., for the purchase and sale of crude oil. The defendant R. STANLEY CORBITT would cause his employer International Petroleum Trading Company, SDAD, LTDA, hereinafter referred to as IPTCO to Contract and purchase crude oil from H. C. IRAN, LTD.

7. It was a further part of the conspiracy that the Defendants THOMAS M. "MICK" HAJECATE, THOMAS H. "TOM" HAJECATE, CHARLES R. AKIN, R. STANLEY CORBITT, and JOHN ALLEN MASEK would use the foreign entities known as MAPCO and H. C. IRAN, LTD., to facilitate and conceal the participation of Uni Oil, Inc., and The Crude Company in a fraudulent scheme to convert volumes of "old" domestic crude oil into "new" domestic crude oil or into "foreign" oil by means of false and misleading certifications.

8. It was a further part of the conspiracy that the Defendants would obtain the services of officers of the Canadian Imperial Bank of Commerce, Georgetown, Grand Cayman, British West Indies, as agents and directors of Mapco and H. C. Iran, Ltd., affiliates of the enterprise, Uni Oil, Inc. Acting on the specific instructions of the Defendants, these bank officials, in their capacity as directors of Mapco and H. C. Iran, Ltd., received and disbursed funds, and also received and mailed invoices. Acting upon specific instructions of the Defendants, these bank officials signed and certified invoices and other documents reflecting the volume and classification of crude oil.

[7]

9. It was a further part of the conspiracy that the Defendants would cause Uni Oil, Inc. to sell to Mapco volumes of domestic crude oil which was certified as 100% "old" oil at $10.95 per barrel, a price substantially higher than the market price for "old" oil. The Defendants would then cause Mapco to sell this same oil to The Crude Company falsely certified as 100% "new" oil.

10. It was a further part of the conspiracy that the Defendants would cause The Crude Company to sell

volumes of crude oil to Mapco and H. C. Iran, Ltd., certified as approximately one-half "old" oil and one-half "new" oil as a composite price of approximately $10.52 a barrel. The Defendants would then cause Mapco and H. C. Iran, Ltd., to sell the same crude oil to International Petroleum Trading Company, SDAD, LTDA, falsely certified as 100% "new" or "foreign."

11. It was a further part of the conspiracy that the Defendants THOMAS M. "MICK" HAJECATE, THOMAS H. "TOM" HAJECATE, and CHARLES R. AKIN would pay Defendant R. STANLEY CORBITT commissions to facilitate and arrange the purchase of the miscertified crude oil by International Petroleum Trading Company, SDAD, LTDA, from Mapco and H. C. Iran, Ltd. These commissions were paid directly to Defendant R. STANLEY CORBITT and were concealed from his employer.

In furtherance of the conspiracy and to effect the objects thereof, the Defendants performed the following overt acts in the Southern District and elsewhere:

OVERT ACTS

1. On or about June 28, 1976, CHARLES R. AKIN sent a letter to an officer of the Canadian Imperial Bank of Commerce, acting in behalf of Mapco, Grand Cayman Islands, confirming an agreement for Mapco to buy approximately 210,000 barrels of crude oil per month from Uni Oil, Inc. at a price of $10.95 per barrel.

[8]

2. On or about August 17, 1976, THOMAS H. "TOM" HAJECATE, THOMAS M. "MICK" HAJECATE, and CHARLES R. AKIN, caused Uni Oil, Inc. to invoice Mapco for June 1976, delivery of 17,692 barrels of crude oil at a unit price of $10.95 a barrel for

a total amount of $193,727.40 certified at 100% lower tier.

3. On or about August 19, 1976, THOMAS M. "MICK" HAJECATE caused Mapco to invoice The Crude Company for 17,692 barrels delivered in June 1976, at $12.05 a barrel for a total amount of $213,188.60 certified as 100% upper tier.

4. On or about July 26, 1976, THOMAS H. "TOM" HAJECATE, CHARLES R. AKIN, R. STANLEY CORBITT, THOMAS M. "MICK" HAJECATE, and JOHN A. MASEK travelled from Houston, Texas, to Grand Cayman, British West Indies.

5. On or about September 28, 1976, THOMAS M. "MICK" HAJECATE, THOMAS H. "TOM" HAJECATE, and CHARLES R. AKIN, caused Uni Oil, Inc. to invoice Mapco for barrels delivered in September 1976, at a unit price of $10.95 for 105,000 barrels for a total amount of $1,149,750.00 certified at 100% lower tier.

6. On or about October 4, 1976, THOMAS M. "MICK" HAJECATE and THOMAS H. "TOM" HAJECATE caused Mapco to invoice The Crude Company for 105,000 barrels delivered in September 1976, at a unit price of $11.97 a barrel for a total amount of $1,256,850.00, certified as 100% upper tier.

7. On or about October 27, 1976, THOMAS M. "MICK" HAJECATE and THOMAS H. "TOM" HAJECATE, and CHARLES R. AKIN, caused Uni Oil, Inc. to invoice Mapco for barrels delivered in October 1976, at a unit price of $10.95 a barrel for 105,462 barrels for a total amount of $1,154,808.90, certified as 100% lower tier.

8. On or about November 3, 1976, THOMAS M. "MICK" HAJECATE and THOMAS H. "TOM" HAJECATE caused Mapco to invoice The Crude Company for 105,462 barrels delivered in October

1976, at a unit price of $11.97 a barrel for a total amount of $1,262,380.14, certified as 100% upper tier.

9. On or about November 30, 1976, THOMAS M. "MICK" HAJECATE, THOMAS H. "TOM" HAJECATE, and CHARLES R. AKIN, caused Uni Oil, Inc. to invoice Mapco for 63,000 barrels delivered in November 1976, at a unit price of $10.95 for a total amount of $689,850.00, certified at 100% lower tier.

10. On or about December 1, 1976, THOMAS M. "MICK" HAJECATE and THOMAS H. "TOM" HAJECATE caused Mapco to invoice The Crude Company for 63,000 barrels at $11.97 per barrel for a total of $754,110.00, certified as 100% upper tier.

11. On or about July 26, 1976, R. STANLEY CORBITT, in behalf of International Petroleum Trading Company, SDAD, LTDA, signed a crude oil sales agreement with International Petroleum Trading Company, SDAD, LTDA, as purchaser and Mapco as seller.

12. On or about September 10, 1976, JOHN ALLEN MASEK caused The Crude Company to invoice Mapco for 269,074.81 barrels at $10.52 per barrel for a total amount of $2,830,667.00, certified as 130,366.75 barrels lower tier and 138,708.06 barrels upper tier.

13. On or about September 27, 1976, JOHN MASEK caused The Crude Company to amend the invoice dated September 10, 1976, to read lower tier: 129,957.31; upper tier: 139,117.50.

14. On or about September 1, 1976, THOMAS M. "MICK" HAJECATE and THOMAS H. "TOM" HAJECATE caused Mapco to invoice International Petroleum Trading Company, SDAD, LTDA, for 100,000 barrels certified as foreign imported crude oil at $12.65 per barrel and for 169,074.81 barrels certified as upper tier at

$11.30 per barrel for a total amount of 269,074.81 barrels at $3,175,545.30.

15. On or about September 19, 1976, CHARLES R. AKIN, THOMAS H. "TOM" HAJECATE, JOHN ALLEN MASEK, and R. STANLEY CORBITT, travelled by a private jet owned by Uni Oil, Inc. from Houston, Texas, to Grand Cayman, British West Indies.

[10]

16. On or about October 18, 1976, JOHN ALLEN MASEK caused The Crude Company to invoice Mapco for 301,218.94 barrels of crude oil delivered in October 1976, at $10.52 per barrel for a total amount of $3,168,-823.25, certified as 139,020.33 barrels lower tier, 153,-571.75 barrels upper tier and 8,626.86 "stripper" crude.

17. On or about November 15, 1976, THOMAS M. "MICK" HAJECATE and JOHN ALLEN MASEK caused Mapco to invoice International Petroleum Trading Company, SDAD, LTDA, for 301,219 barrels delivered in October 1976, at $11.30 per barrel for a total amount of $3,403,774.70, certified as all upper tier.

18. On or about March 16, 1976, R. STANLEY CORBITT, in behalf of International Petroleum Trading Company, SDAD, LTDA, and THOMAS M. "MICK" HAJECATE, in behalf of H. C. IRAN, LTD., executed an agreement whereby International Petroleum Trading Company, SDAD, LTDA, was to be the exclusive marketing agent for H. C. Iran, Ltd., for the sale of crude oil.

19. On or about April 28, 1976, JOHN ALLEN MASEK, in behalf of The Crude Company, and an officer of the Canadian Imperial Bank of Commerce, Grand Cayman, British West Indies, acting in behalf of H. C. Iran, Ltd., executed a contract for the purchase and sale of crude oil.

20. On or about April 21, 1976, THOMAS M. "MICK" HAJECATE wrote a letter in behalf of H. C. Iran, Ltd., to R. STANLEY CORBITT in behalf of International Petroleum Trading Company, SDAD, LTDA.

21. On or about July 16, 1976, JOHN ALLEN MASEK, caused The Crude Company to invoice H. C. Iran, Ltd., for crude oil delivered in July 1976, for 325,336.68 barrels at $10.52 per barrel for a total amount of $3,422,341.89, and certified this crude as 148,974.44 barrels lower tier and 176,362.24 barrels upper tier.

[11]

22. On or about July 20, 1976, THOMAS M. "MICK" HAJECATE caused H. C. Iran, Ltd. to invoice International Petroleum Trading Company, SDAD, LTDA for crude oil delivered on July 8, 1976, for 325,366.68 barrels at $11.30 per barrel for a total amount of $3,676,-643.40, certified as new, released or stripper crude.

23. From the month of January 1976, to January 1, 1977, THOMAS M. "MICK" HAJECATE, THOMAS H. "TOM" HAJECATE and CHARLES R. AKIN, through Uni Oil, Inc., purchased approximately 774,397 barrels of crude oil containing volumes certified as "old oil" and "new oil" per Federal Energy Administration regulations at a price ranging from $5.28 to $11.91 per barrel.

24. From the month of January 1976, to January 1, 1977, THOMAS M. "MICK" HAJECATE, THOMAS H. "TOM" HAJECATE and CHARLES R. AKIN, through Uni Oil, Inc., sold to Mapco, approximately 774,-397 barrels of crude oil certified as "old" oil per Federal Energy Administration regulations at a price of $10.95 a barrel for a total of approximately $8,479,647.75.

25. From the month of January 1976, to January 1, 1977, Mapco sold to JOHN MASEK and The Crude

Company approximately 774,497 barrels certified a "new" crude oil at prices ranging approximately fro $11.85 to $11.97 per barrel for a total of approximate $9,245,914.25.

26. From the month of April, 1976, to January 1977, JOHN MASEK and The Crude Company sold Mapco and H. C. Iran, Ltd., approximately 4,116,08 barrels of crude oil certified as approximately one-ha "old" and one-half "new" per Federal Energy Admi istration regulations at a price of $10.52 a barrel f a total of approximately $43,520,964.20.

27. From the month of April, 1976, to January 1977, Mapco and H. C. Iran, Ltd., sold to R. STANLE CORBITT and International Petroleum Trading Co pany, SDAD, LTDA, approximately 4,116,081 barrels crude oil certified as "new" or "foreign" oil at a pri ranging from $11.30 to $12.65 a barrel for a tot of approximately $47,868,845.52. (Violation: Title 1 United States Code, Section 1962(d)).

[12]

COUNT TWO

1. The Grand Jury alleges and incorporates by refe ence herein paragraphs one and two of Count One of t Indictment, and all subparagraphs thereof, and made part of this Count as if fully set forth and describe herein.

2. From on or about January 1, 1976, the exact da being unknown to the grand jurors, continuing to on about January 1, 1977, within the Houston Division the Southern District of Texas, and elsewhere, and with the jurisdiction of this Court, Defendants THOMAS "MICK" HAJECATE, THOMAS H. "TOM" HAJ CATE, CHARLES R. AKIN, R. STANLEY CORBIT and JOHN ALLEN MASEK, being persons employe by and associated with an enterprise, Uni Oil, Inc., t

gether with its affiliates, including Mapco and H. C. Iran, Ltd., which was engaged in and the activities of which affected interstate commerce, did knowingly, willfully and unlawfully conduct and participate directly and indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity, consisting of violations of the Federal Mail Fraud Statute (Title 18, United States Code, Section 1341) as charged in Counts Three through Twenty-Three of this Indictment, which are alleged and incorporated in this count by reference as if fully set forth herein.

[13]

3. In connection with the aforesaid pattern of racketeering activity, as defined by Title 18, United States Code, Sections 1961(1)(B), and 1961(5), Defendants THOMAS M. "MICK" HAJECATE, THOMAS H. "TOM" HAJECATE, CHARLES R. AKIN, JOHN ALLEN MASEK, and R. STANLEY CORBITT, devised and intended to devise a scheme and artifice to defraud the United States, various oil companies, and members of the general public by means of false and fraudulent pretenses, representations, and promises.

4. It was part of the scheme and artifice to defraud that Defendants, THOMAS M. "MICK" HAJECATE, THOMAS H. "TOM" HAJECATE, JOHN ALLEN MASEK, R. STANLEY CORBITT, and CHARLES R. AKIN, defraud an agency of the United States, to wit, the Federal Energy Administration, now known as the United States Department of Energy, of its right to have its program of regulations providing for the certification of domestic crude petroleum sales, codified as Title 10, C.F.R. § 212.131 *et seq.*, conducted honestly, fairly, impartially, and free from deceit, craft, trickery, corruption, dishonesty and fraud.

5. It was a part of the scheme and artifice to defraud that THOMAS M. "MICK" HAJECATE, THOMAS H. "TOM" HAJECATE, JOHN ALLEN MASEK, R. STANLEY CORBITT, and CHARLES R. AKIN, would and did utilize Mapco and H. C. Iran, Ltd., both offshore entities in Grand Cayman, British West Indies, as vehicles for the miscertification of oil contrary to United States Department of Energy Regulations, 10 C.F.R. 212.131.

[14]

6. It was a further part of the scheme and artifice to defraud that Defendants THOMAS M. "MICK" HAJECATE, THOMAS H. "TOM" HAJECATE, CHARLES R. AKIN, JOHN ALLEN MASEK, and R. STANLEY CORBITT, and others to the grand jurors known and unknown, would deliver and cause to be delivered to various oil companies and individuals falsely and fraudulently prepared invoices and certifications by placing in the United States Post Office, an authorized depository for mail matter, the said invoices and certifications, to be sent or delivered by the United States Postal Service, in violation of the Mail Fraud Statute, Title 18, United States Code, Section 1341.

7. Through the aforesaid pattern of racketeering activity, Defendants THOMAS M. "MICK" HAJECATE, and THOMAS H. "TOM" HAJECATE did directly and indirectly utilize their ownership interests in Uni Oil, Inc., its subsidiaries and affiliates, both foreign and domestic, including Mapco and H. C. Iran, Ltd., in furtherance of the unlawful conduct of the affairs of the enterprise, thereby making such interests subject to forfeiture to the United States pursuant to Title 18, United States Code, Section 1963(a).

(Violation: Title 18, United States Code, Sections 1962 (c) and 2)

COUNT THREE

1. The Grand Jury alleges and incorporates by reference herein paragraphs one and two of Count One of this indictment, and all subparagraphs thereof, and made a part of this Count as if fully set forth and described herein.

2. Beginning on or about January 1, 1976, and continuing to on or about January 1, 1977, within the Southern District of Texas, Houston Division, and elsewhere, Defendants MAPCO, H. C. IRAN, LTD., UNI OIL, INC., THOMAS M. "MICK" HAJECATE, THOMAS H. "TOM" HAJECATE, CHARLES R. AKIN, R. STANLEY CORBITT, THE CRUDE COMPANY, and JOHN ALLEN MASEK, hereinafter referred

[15]

to as defendants, along with other both known and unknown to the Grand Jury, did devise and intend to devise a scheme and artifice (a) to defraud the United States and agencies thereof, to wit: Federal Energy Administration, now known as the United States Department of Energy, of its right to have its programs and regulations pertaining to the allocation of crude oil and the certification of domestic crude petroleum sales, codified as Title 10, Code of Federal Regulations, Section 212.131, *et seq.*, conducted honestly, fairly, impartially and free from deceit, craft, trickery, corruption, dishonesty and fraud by means of false and fraudulent pretenses, representations and promises in the certification of volumes of domestic crude petroleum, well knowing that the pretenses, representations and promises would be and were false and fraudulent when made; and (b) to defraud and to obtain money and other property by means of false and fraudulent pretenses, representations and promises from various persons, firms, companies and corporations located in the United States, and elsewhere, and such other customers, who were purchasers of do-

mestic crude petroleum and who relied under the Federal Energy Regulations on certifications made by defendants, as to whether the volumes of domestic crude petroleum purchased were controlled and regulated domestic crude petroleum, i.e., "old" crude petroleum.

3. It was a part of the scheme and artifice to defraud and to obtain money and other property by means of false and fraudulent pretenses, representations and promises, that Defendants would utilize MAPCO and H. C. IRAN, LTD., foreign offshore entities in Grand Cayman, British West Indies, as vehicles for the miscertification of crude oil.

4. It was a further part of the scheme and artifice to defraud and to obtain money and other property by means of false

[16]

and fraudulent pretenses, representations, and promises that Defendants would sell crude oil to Defendant MAPCO certified at 100% "old" oil. Defendants would then cause Defendant MAPCO to sell this oil falsely certified as 100% "new" oil to Defendant THE CRUDE COMPANY.

5. It was further part of the scheme and artifice to defraud and to obtain money and other property by means of false and fraudulent pretenses, representations, and promises that the Defendants would cause THE CRUDE COMPANY to sell volumes of crude oil to Defendants MAPCO and H. C. IRAN, LTD., certified as approximately 50% "old" oil and 50% "new" oil at a composite price of approximately $10.52 a barrel and would then cause MAPCO and H. C. IRAN, LTD., to sell the same crude oil to International Petroleum Trading Company, SDAD, LTDA, falsely certified as 100% "new" or "foreign" oil.

6. It was a further part of the scheme and artifice to defraud and to obtain money and other property by means of false and fraudulent pretenses, representations and promises that defendants would and did prepare and submit and cause to be prepared and submitted to purchasers of the crude petroleum, certifications which stated that no volume of "old" crude petroleum was included in the total volume of crude pertoleum sold; and/or the volume of petroleum being sold was certified as "new" oil or "foreign" oil and therefore of a different regulated category and price, when in truth and fact, as defendants well knew at the time, the certifications of the volume of crude petroleum sold were false, fraudulent and untrue.

7. It was a further part of the scheme and artifice to defraud and to obtain money and other property by means of false and fradulent pretenses, representations and promises that defendants would and did obtain substantially higher prices for the sale of the domestic crude oil volumes that were falsely

[17]

and fraudulently certified than the defendants could have obtained had the volumes of domestic crude oil been correctly certified.

8. It was a further part of the scheme and artifice to defraud and to obtain money and other property by means of false and fraudulent pretenses, representations and promises, that the defendants would make payments to R. STANLEY CORBITT of International Petroleum Trading Company to induce him to purchase a supply of crude oil from MAPCO and H. C. IRAN, LTD., thereby providing MAPCO with a secure market for crude oil which they subsequently miscertified.

9. On or about the dates listed below, MAPCO, H. C. IRAN, LTD., UNI OIL, INC., THOMAS M. "MICK"

HAJECATE, THOMAS H. "TOM" HAJECATE, CHARLES R. AKIN, R. STANLEY CORBITT, THE CRUDE COMPANY and JOHN ALLEN MASEK, defendants herein, for the purpose of executing the aforesaid scheme and artifice to defraud and attempting to do so,

(a) did place, and cause to be placed in an authorized depository for mail matter in the Southern District of Texas, envelopes listed below containing oil invoices, certifications, and contracts to be sent and delivered by the Postal Service of the United States, each such use of the mails being a separate count of this Indictment:

[18]

COUNT:

3

SENDER:

UNI OIL, INC.
P. O. Box 36158
Houston, Texas

ADDRESSEE:

MAPCO
P. O. Box 694
Grand Cayman, B.W.I.

MATTER MAILED:

A letter containing Invoice # 147 to MAPCO from UNI OIL, INC.

DATE OF MAILING ON OR ABOUT:

July 22, 1976

COUNT:

4

SENDER:

UNI OIL, INC.
P. O. Box 36158
Houston, Texas

ADDRESSEE:

MAPCO
P. O. Box 694
Grand Cayman, B.W.I.

MATTER MAILED:

A letter containing Invoice # 155 to MAPCO from UNI OIL, INC.

DATE OF MAILING ON OR ABOUT:

August 13, 1976

COUNT:

5

SENDER:

UNI OIL, INC.
P. O. Box 36158
Houston, Texas

ADDRESSEE:

MAPCO
P. O. Box 694
Grand Cayman, B.W.I.

MATTER MAILED:

A letter containing Invoice # 157 to MAPCO from UNI OIL, INC.

DATE OF MAILING ON OR ABOUT:

August 13, 1976

COUNT:

6

SENDER:

UNI OIL, INC.
P. O. Box 694
Grand Cayman, B.W.I.

MATTER MAILED:

A letter containing Invoice # 158 to MAPCO from UNI OIL, INC.

DATE OF MAILING ON OR ABOUT:

August 17, 1976

COUNT:

7

SENDER:

UNI OIL, INC.
P. O. Box 36158
Houston, Texas

ADDRESSEE:

MAPCO
P. O. Box 694
Grand Cayman, B.W.I.

MATTER MAILED:

A letter containing Invoice # 168 to MAPCO from UNI OIL, INC.

DATE OF MAILING ON OR ABOUT:

July 31, 1976

COUNT:

8

SENDER:

UNI OIL, INC.
P. O. Box 36158
Houston, Texas

ADDRESSEE:

MAPCO
P. O. Box 694
Grand Cayman, B.W.I.

MATTER MAILED:

A letter containing Invoice # 173 to MAPCO from UNI OIL, INC.

DATE OF MAILING ON OR ABOUT:

August 31, 1976

COUNT:

9

SENDER:

UNI OIL, INC.
P. O. Box 36158
Houston, Texas

ADDRESSEE:

MAPCO
P. O. Box 694
Grand Cayman, B.W.I.

MATTER MAILED:

A letter containing Invoice # 176 to MAPCO from UNI OIL, INC.

DATE OF MAILING ON OR ABOUT:

September 28, 1976

COUNT:

10

SENDER:

UNI OIL, INC.
P. O. Box 36158
Houston, Texas

ADDRESSEE:

MAPCO
P. O. Box 694
Grand Cayman, B.W.I.

MATTER MAILED:

A letter containing Invoice # 177 to MAPCO from UNI OIL, INC.

DATE OF MAILING ON OR ABOUT:

September 28, 1976

COUNT:

11

SENDER:

UNI OIL, INC.
P. O. Box 36158
Houston, Texas

ADDRESSEE:

MAPCO
P. O. Box 694
Grand Cayman, B.W.I.

MATTER MAILED:

A letter containing Invoice # 180 to MAPCO from UNI OIL, INC.

DATE OF MAILING ON OR ABOUT:

October 27, 1976

COUNT:

12

SENDER:

UNI OIL, INC.
P. O. Box 36158
Houston, Texas

ADDRESSEE:

MAPCO
P. O. Box 694
Grand Cayman, B.W.I.

MATTER MAILED:

A letter containing Invoice # 181 to MAPCO from UNI OIL, INC.

DATE OF MAILING ON OR ABOUT:

October 27, 1976

COUNT:

13

SENDER:

UNI OIL, INC.
P. O. Box 36158
Houston, Texas

ADDRESSEE:

MAPCO
P. O. Box 694
Grand Cayman, B.W.I.

MATTER MAILED:

A letter containing Invoice # 199 to MAPCO from UNI OIL, INC.

DATE OF MAILING ON OR ABOUT:

November 30, 1976

COUNT:

14

SENDER:

UNI OIL, INC.
P. O. Box 36158
Houston, Texas

ADDRESSEE:

MAPCO
P. O. Box 694
Grand Cayman, B.W.I.

MATTER MAILED:

A letter containing Invoice # 202 to MAPCO from UNI OIL, INC.

DATE OF MAILING ON OR ABOUT:

November 30, 1976

[19]

COUNT:

15

SENDER:

UNI OIL, INC.
P. O. Box 36158
Houston, Texas

ADDRESSEE:

MAPCO
P. O. Box 694
Grand Cayman, B.W.I.

MATTER MAILED:

A letter containing Invoice # 203 to MAPCO from UNI OIL, INC.

DATE OF MAILING ON OR ABOUT:

November 30, 1976

COUNT:

16

SENDER:

UNI OIL, INC.
P. O. Box 36158
Houston, Texas

ADDRESSEE:

MAPCO
P. O. Box 694
Grand Cayman, B.W.I.

MATTER MAILED:

A letter containing Invoice # 235 to MAPCO from UNI OIL, INC.

DATE OF MAILING ON OR ABOUT:

December 22, 1976

COUNT:

17

SENDER:

UNI OIL, INC.
P. O. Box 36158
Houston, Texas

ADDRESSEE:

MAPCO
P. O. Box 694
Grand Cayman, B.W.I.

MATTER MAILED:

A letter containing Invoice # 239 to MAPCO from UNI OIL, INC.

DATE OF MAILING ON OR ABOUT:

December 28, 1976

COUNT:

18

SENDER:

UNI OIL, INC.
P. O. Box 36158
Houston, Texas

ADDRESSEE:

MAPCO
P. O. Box 694
Grand Cayman, B.W.I.

MATTER MAILED:

A letter containing Invoice # 243 to MAPCO from UNI OIL, INC.

DATE OF MAILING ON OR ABOUT:

December 30, 1976

COUNT:

19

SENDER:

Iptco
1100 Milam
Suite 2165
Houston, Texas

ADDRESSEE:

H. C. IRAN
P. O. Box 694
Grand Cayman, B.W.I.

MATTER MAILED:

Letter from Iptco to H. C. IRAN

DATE OF MAILING ON OR ABOUT:

June 1, 1976

and (b) did knowingly cause the envelopes containing oil invoices, certifications, and contracts listed below to be delivered by mail according to the directions thereon in the Southern District of Texas, each use of the mails being a separate count of the indictment:

COUNT:

20

SENDER:

H. C. IRAN, LTD.
P. O. Box 694
Grand Cayman, B.W.I.

ADDRESSEE:

Iptco
1100 Milam
Suite 2165
Houston, Texas

MATTER MAILED:

A letter containing an agreement between H. C. IRAN, LTD., and Iptco

DATE OF MAILING ON OR ABOUT:

April 28, 1976

COUNT:

21

SENDER:

H. C. IRAN, LTD.
P. O. Box 694
Grand Cayman, B.W.I.

* * * *

ADDRESSEE:

Iptco
1100 Milam
Suite 2165
Houston, Texas

MATTER MAILED:

A letter containing Invoice #122 to Iptco from H. C. IRAN, LTD.

DATE OF MAILING ON OR ABOUT:

May 20, 1976

COUNT:

22

SENDER:

MAPCO
P. O. Box 694
Grand Cayman, B.W.I.

ADDRESSEE:

Iptco
1100 Milam
Suite 2165
Houston, Texas

MATTER MAILED:

A letter containing an agreement between MAPCO and Iptco

DATE OF MAILING ON OR ABOUT:

July 26, 1976

COUNT:

23

SENDER:

MAPCO
P. O. Box 694
Grand Cayman, B.W.I.

ADDRESSEE:

Iptco
1100 Milam
Suite 2165
Houston, Texas

MATTER MAILED:

A letter containing an agreement between Iptco and MAPCO

DATE OF MAILING ON OR ABOUT:

September 10, 1976

(Violation: Title 18, United States Code, Sections 1341 and 2)

[20]

COUNTS TWENTY-FOUR TO TWENTY-NINE

1. The Grand Jury alleges and incorporates by reference herein paragraphs 1 and 2 of Count One of this Indictment, and all subparagraphs thereof, and made a part of this Count as if fully set forth and described herein.

2. On or about the dates listed below, in the Houston Division of the Southern District of Texas, and within

the jurisdiction of this Court, Defendants MID-ATLANTIC PETROLEUM COMPANY (MAPCO), H. C. IRAN, LTD., UNI OIL, INC., THOMAS M. "MICK" HAJECATE, THOMAS H. "TOM" HAJECATE, CHARLES R. AKIN, R. STANLEY CORBITT, THE CRUDE COMPANY, and JOHN ALLEN MASEK, in a matter within the jurisdiction of the Federal Energy Administration, an agency of the United States, did knowingly and willfully make and use and cause to be made and used, false writings and documents knowing them to contain false and fraudulent material statements, in that Defendants, in connection with the sale of crude oil to the oil companies listed below, submitted and caused to be submitted, writings as described herein below, certifying certain barrels of crude oil as "new" crude oil sold; whereas in truth and fact, as Defendants well know, the certifications were false in that, as listed below, barrels of "old" crude oil were falsely certified as "new" crude oil.

Count:

24

Date:

July 20, 1976

Volumes of Barrels of "Old" Domestic Crude Oil Falsely Certified as "New" Oil:

148,974.44 New

Invoice Number:

124

Purchaser of Crude Oil:

Iptco

Count:

25

Date:

September 23, 1976

Volumes of Barrels of "Old" Domestic Crude Oil Falsely Certified as "New" Oil:

209,307.62 New

Invoice Number:

718

Purchaser of Crude Oil:

Iptco

Count:

26

Date:

November 15, 1976

Volumes of Barrels of "Old" Domestic Crude Oil Falsely Certified as "New" Oil:

104,289.05 New

Invoice Number:

715

Purchaser of Crude Oil:

Iptco

Count:

27

Date:

November 15, 1976

Volumes of Barrels of "Old" Domestic Crude Oil Falsely Certified as "New" Oil:

139,020.23 New

Invoice Number:

718

Purchaser of Crude Oil:

Iptco

[21]

Count:

28

Date:

July 29, 1976

Volumes of Barrels of "Old" Domestic Crude Oil Falsely Certified as "New" Oil:

271,569.25 New

Invoice Number:

NY-15

Purchaser of Crude Oil:

Iptco

LETTER OF THE SECRETARY OF THE INTERIOR

The letter of the Secretary of the Interior dated May 2, 1934, to the Chairman of the Committee on the Judiciary, United States Senate, reads:

THE SECRETARY OF THE INTERIOR,
Washington, May 2, 1934.

HON. HENRY F. ASHURST, *Chairman,*
Committee on the Judiciary,
United States Senate.

MY DEAR SENATOR ASHURST: There is transmitted, herewith a draft of a proposed bill, providing a penalty for the knowing or willful presentation of any false written instrument relating to any matter within the jurisdiction of any department or agency of the Government.

This proposed bill is intended to reach the large number of cases involving the shipment of "hot" oil, where false papers are presented in connection therewith, and also those cases within the Public Works Administration where contractors are performing work payable from the Public Works Administration appropriation, and false certificates are made as to the actual wages paid.

I wish to call your attention to the fact that an attempt was made to secure legislation of this kind in the submission of Senate 2686, which bill passed the Senate February 20, but there was substituted therefor H.R. 8046, which bill passed both houses and was the subject of the veto of the President on April 17, on recommendation of the Department of Justice.

It is believed that the present bill is broad enough in terms to include all governmental agencies and

the penalties have been increased to make it consistent with the penalties specified in Section 80 of the Criminal Code.

The early enactment of this legislation is highly desirable to this Department in order to secure prosecutions while expenditures are being made of Public Works Administration funds and during the life of the National Industrial Recovery Act of June 16, 1933, which expires by limitation two years after date of passage and is the source of the regulations under Section 9(c) thereof, prohibiting the transportation of "hot" oil in interstate and foreign commerce.

It is respectfully requested that the proposed measure be placed before the Senate for appropriate action.

Sincerely yours,

(Sgd.) HAROLD L. ICKES,
Secretary of the Interior.

Inclosure 273941.

Opposition

Office - Supreme Court, U.S.
FILED
DEC 3 1981

No. 81-828

In the Supreme Court of the United States

OCTOBER TERM, 1981

CRUDE COMPANY AND JOHN ALLEN MASEK,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

REX E. LEE
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

TABLE OF AUTHORITIES

Page

Cases:

American Construction Co. v. *Jacksonville, Tampa & Key West Ry.*, 148 U.S. 372 3

Brotherhood of Locomotive Firemen & Enginemen v. *Bangor & Aroostook R.R.*, 389 U.S. 327 3

Hamilton Shoe Co. v. *Wolf Brothers*, 240 U.S. 251 3

Statutes and regulation:

Economic Stabilization Act of 1970, Section 211(b)(2), 12 U.S.C. 1904 note 1

Emergency Petroleum Allocation Act of 1973, 15 U.S.C. 751 *et seq.* 1

Section 5(a)(1), 15 U.S.C. 754(a)(1) 1

18 U.S.C. 1001 2

18 U.S.C. 1341 2

18 U.S.C. 1962 2

18 U.S.C. 1962(c) 2

18 U.S.C. 1962(d) 2

10 C.F.R. 212.131(b)(1) 2

In the Supreme Court of the United States

OCTOBER TERM, 1981

No. 81-828

CRUDE COMPANY AND JOHN ALLEN MASEK,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners contend that the exclusive appellate jurisdiction of the Temporary Emergency Court of Appeals (TECA) over "all appeals from the district courts of the United States in cases and controversies arising under" Section 5(a)(1) of the Emergency Petroleum Allocation Act of 1973, 15 U.S.C. 754(a)(1) (which incorporates Section 211(b)(2) of the Economic Stabilization Act of 1970, 12 U.S.C. 1904 note) extends to an appeal by the United States from the dismissal of an indictment charging mail fraud, wire fraud, false representation within the jurisdiction of the Federal Energy Administration, and conspiracy to violate the racketeering enterprise statute. Petitioners also contend that their indictment should be dismissed because the criminal provisions of the Emergency Petroleum Allocation Act of 1973 (EPAA), 15 U.S.C. 751 *et seq.*, preempt the applications of other federal criminal statutes and that the EPAA regulations fail to provide fair warnings.

Petitioners, a corporation involved in the reselling of crude oil and one of its officers, were charged with others in a 29-count indictment returned in the United States District Court for the Southern District of Texas with participation in a fraudulent scheme to certify "old" oil as "new" oil and to make false certifications in furtherance of that scheme.[1] Petitioners were charged with 21 counts of mail fraud, in violation of 18 U.S.C. 1341; and with six counts of making false statements in a matter within the jurisdiction of the Federal Energy Administration, in violation of 18 U.S.C. 1001. Petitioner Masek was also charged with participating in a pattern of racketeering activity, in violation of 18 U.S.C. 1962(c) and with conspiracy to violate that statute, in violation of 18 U.S.C. 1962(d) (Pet. App. 44a-77a). Each count of the indictment related to a violation or violations of a certification regulation, 10 C.F.R. 212.131(b)(1), promulgated under the EPAA (Pet. App. 3a). The district court dismissed the indictment on the grounds that the EPAA preempts application of 18 U.S.C. 1341, 1001 and 1962 to the conduct alleged in the indictment and that the certification regulation does not give fair notice and cannot be the predicate for a criminal prosecution. The district court also dismissed the six counts under 18 U.S.C. 1001 on the further ground that the statute does not apply to statements such as EPAA certifications, which are not submitted directly to a government agency. The court of appeals reversed, first rejecting the jurisdictional argument that the

---

[1] As the court of appeals explained (Pet. App. 2a n.2):

> The price at which domestic crude oil may lawfully be sold depends *inter alia* on its origin. As resellers, appellees were obliged to "certify" that the oil they traded came from "old" or "new" wells since different ceiling prices applied to each. The gravamen of the Government's charge is that appellees purchased "old" oil and resold it as "new," willfully using fraudulent means to miscertify it in the process.

district court decision in this case arose under the EPAA, thus giving the TECA exclusive jurisdiction over the appeal (Pet. App. 4a-13a).

Petitioners contend (Pet. 6-18) that the Fifth Circuit should not have considered this appeal because the EPAA gave the TECA exclusive appellate jurisdiction. They also contend (Pet. 19-29) that the court of appeals erred in reinstating the indictment, arguing that the criminal provisions of the EPAA preempt the application of the provisions of Title 18 and that the EPAA regulations do not provide fair warning. Whatever the merits of petitioners' contentions, they are not presently ripe for review by this Court. The court of appeals' decision places petitioners in precisely the same position they would have occupied if the district court had denied their motion to dismiss the indictment. If petitioners are acquitted following a trial on the merits, their claims will be moot. If, on the other hand, petitioners are convicted, they will then be able to present their present contentions to the Court, together with any other claims they may have, in a petition for a writ of certiorari seeking review of a final judgment against them. Accordingly, review by this Court of the court of appeals' decision would be premature at this time. See, *e.g.*, *Brotherhood of Locomotive Firemen & Enginemen* v. *Bangor & Aroostook R.R.*, 389 U.S. 327 (1967); *American Construction Co.* v. *Jacksonville, Tampa & Key West Ry.*, 148 U.S. 372, 384-388 (1893); see *Hamilton Shoe Co.* v. *Wolf Brothers*, 240 U.S. 251, 257-258 (1916).[2]

---

[2]Because this case is interlocutory, we are not responding on the merits to the questions presented by the petition. We will file a response on the merits if the Court requests. On the jurisdictional question, we recently responded to a similar issue in *Zang* v. *United States*, No. 81-146; we have sent a copy of our brief in opposition in that case to counsel for petitioners.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

DECEMBER 1981

DOJ-1981-12

Petitioner's Reply Brief

Office - Supreme Court, U.S.
FILED
DEC 17 1981
ALEXANDER L. STEVAS,
CLERK

No. 81-828

IN THE
Supreme Court of the United States
OCTOBER TERM, 1981

THE CRUDE COMPANY AND JOHN ALLEN MASEK,
Petitioners,
v.
UNITED STATES OF AMERICA,
Respondent.

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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TABLE OF CONTENTS

	Page
I. THIS CASE IS RIPE FOR DETERMINATION	1
A. The Conflict in the Circuits Warrants a Grant of Certiorari	2
B. The Importance of the Issues Warrants a Grant of Certiorari	2
C. The Issues Raised Here are Fundamental to the Further Conduct of the Case	3
D. The Government's Authorities are Distinguishable From This Case	5
II. THE GOVERNMENT'S BRIEF IN OPPOSITION IN *ZANG* v. *UNITED STATES* IS NOT APPOSITE	7

TABLE OF AUTHORITIES

Cases:	Page
American Construction Company v. *Jacksonville, Tampa & Key West Railway*, 148 U.S. 372 (1893)	6
Bray v. *United States*, 423 U.S. 73 (1975)	8
Brotherhood of Locomotive Firemen & Enginemen v. *Bangor & Aroostook Railroad*, 389 U.S. 327 (1967)	6
Carroll v. *United States*, 354 U.S. 394 (1957)	2
DiBella v. *United States*, 369 U.S. 121 (1962)	2
Gillespie v. *United States Steel Corp.*, 379 U.S. 148 (1964)	4
Hamilton-Brown Shoe Co. v. *Wolf Brothers*, 240 U.S. 251 (1916)	5-6
Land v. *Dollar*, 330 U.S. 731 (1947)	3, 4
Larson v. *Domestic and Foreign Commerce Corp.*, 337 U.S. 682 (1949)	3-4
Louisville and Nashville Railroad Co. v. *Mottley*, 211 U.S. 149 (1908)	8
Serfass v. *United States*, 420 U.S. 377 (1975)	4-5
United States v. *Zang*, 645 F.2d 999 (Temp. Emer. Ct. App. 1981)	7
United States v. *Zang*, 653 F.2d 493 (Temp. Emer. Ct. App.), *cert. denied*, No. 81-146, 50 U.S.L.W. 3248 (Oct. 5, 1981)	7-8

Statutes:	
18 U.S.C. §§ 1341, 1001, 1962 (1976)	8
18 U.S.C. § 3731 (1976)	4-5
28 U.S.C. § 1254 (1976)	3
28 U.S.C. § 1257 (1976)	3

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

No. 81-828

THE CRUDE COMPANY AND JOHN ALLEN MASEK,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

I. THIS CASE IS RIPE FOR DETERMINATION

The Government's sole point in its Memorandum in Opposition to the Petition for Certiorari is that this case would be mooted if the petitioners-defendants are required to undergo trial and are acquitted, and that review of the Fifth Circuit's decision at this juncture is thus "premature." (Mem. Opp. 3). But the Government does not dispute the importance or merits of the issues presented in the petition. These issues will continue to arise in other cases until resolved by this Court, and it is not in the public interest nor the parties' interest to delay that resolution. The case is "ripe for review" now.

The Government argues that "this case is interlocutory." (Mem. Opp. 3 n.2). But the order of dismissal of the indictment by the district court was not an "interlocutory" decision in the usual sense of that term. It was a final judgment terminating the proceedings below; and were this Court on review to uphold the ruling of the district court, that would conclude the proceedings in this case. Nevertheless, as shown below, this Court has often reviewed even truly interlocutory decisions where appropriate factors were present. *A fortiori* review is appropriate in the procedural posture of the case here.

A. The Conflict in the Circuits Warrants a Grant of Certiorari

This Court has granted certiorari in cases involving interlocutory orders where there was a conflict among the circuits on the question to be decided. See *e.g.*, *DiBella* v. *United States*, 369 U.S. 121, 123 (1962) (certiorari to review the appealability of suppression orders). As we pointed out in the Petition, there is a conflict in the Circuits on the jurisdictional issues raised here. (Pet. 6-18).

B. The Importance of the Issues Warrants a Grant of Certiorari

The importance of the questions raised also warrants a grant of certiorari to review an interlocutory decision. *See, e.g., Carroll* v. *United States*, 354 U.S. 394, 397 (1957), where this Court agreed to review the court of appeals' jurisdiction to reverse a suppression order "because of the importance of [the jurisdictional] question to the administration of the federal criminal laws." In the instant case, the Government itself, in moving for an expedited appeal below, argued to the Fifth Circuit that a prompt decision concerning the preemption issue is of major significance to the oil pricing enforcement scheme:

> "The action of the district court in Houston . . . confuses the entire oil pricing criminal enforcement program
>
> * * * *
>
> The present shortage of petroleum products, and the prospects that this condition will be chronic, necessitates an effective enforcement program at the earliest possible moment." Brief for Appellant, No. 79-2488, at II-III.

C. The Issues Raised Here are Fundamental to the Further Conduct of the Case

The fact that the decision of the Court of Appeals here may in some way be said to lack finality because it reverses the dismissal of an indictment, does not preclude a grant of certiorari.[1] In numerous cases this Court has agreed to review decisions raising important jurisdictional or other questions after a court of appeals reversed the granting of a motion to dismiss and remanded for trial. Where there are significant issues of law which are fundamental to the proceedings, this Court has granted certiorari to review appellate judgments that did not conclude the litigation below. For instance in *Land* v. *Dollar*, 330 U.S. 731 (1947), the Court of Appeals reversed a district court's dismissal with prejudice of a complaint. This Court held:

> "Although the judgment below was not a final one, we considered it appropriate for review because it involved an issue 'fundamental to the further conduct of the case.' *United States* v. *General Motors Corp.*, 323 U.S. 373, 377 [1945]." 330 U.S. at 734 n.2.

Larson v. *Domestic and Foreign Commerce Corp.*, 337 U.S. 682 (1949), also supports a grant of certiorari here.

---

[1] Although the requirement of a final judgment or decree limits review of state court judgments, 28 U.S.C. § 1257 (1976), there is no such limitation on review of cases in the federal courts of appeals. 28 U.S.C. § 1254 (1976).

In *Larson* the district court granted a motion to dismiss for lack of jurisdiction, and the court of appeals reversed and remanded. This Court held:

> "The judgment of the Court of Appeals was not a final one, but we considered it appropriate for review here since, in our view, the jurisdictional issue was 'fundamental to the further conduct of the case.'" 337 U.S. 685 n.3, (*citing Land* v. *Dollar*, 330 U.S. at 734).

Similarly here, the issues of exclusive TECA jurisdiction, preemption, and the constitutionality of the EPAA regulations, are all "fundamental to the further conduct of the case." *Id.* In *Gillespie* v. *United States Steel Corp.*, 379 U.S. 148 (1964), where the court of appeals affirmed a district court order striking parts of a complaint, this Court in determining whether to grant certiorari noted that "the requirement of finality is to be given a 'practical rather than a technical construction.' *Cohen* v. *Beneficial Industrial Loan Corp.*, *supra*, 337 U.S. at 546," 379 U.S. at 152, and stated further

> ". . . it seems clear now that the case is before us that the eventual costs, as all the parties recognize, will certainly be less if we now pass on the questions presented here rather than send the case back with those issues undecided." *Id.* at 153.

That is precisely the situation here.

In the context of criminal proceedings, this Court has found it appropriate to grant review in a procedural posture similar to the case here.[2] For example, in *Serfass*

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[2] Under former 18 U.S.C. § 3731, the incidence of Court of Appeals' review of dismissals of indictments was restricted, since many appeals from dismissals of indictments lay directly to this Court, and not through the courts of appeals. Prior to 1971, a direct appeal to this Court was permitted

> "[f]rom a decision or judgment setting aside, or dismissing any indictment or information, or any count thereof, where such decision or judgment is based upon the invalidity or con-

v. *United States*, 420 U.S. 377, 383 (1975), the district court in a pretrial ruling dismissed an indictment, in a prosecution for failure to submit for induction into the Armed Forces. The court of appeals, rejecting the contention that it lacked jurisdiction because the double jeopardy clause barred further prosecution, reversed and remanded for trial. Nonetheless, this Court granted certiorari to review the judgment of the court of appeals.

D. The Government's Authorities Are Distinguishable From This Case

The three cases cited in the Government's Memorandum in Opposition, at 3, do little to advance the Government's argument that review by this Court "would be premature at this time." *Ibid.* Two are civil cases that involved interlocutory district court orders, which were reversed on appeal, and the third was an appeal where the appellate court reversed and remanded for an accounting and injunction, which was reviewed on a later grant of certiorari. Thus all three are unlike the district court's final judgment in the present criminal case, which dismissed the indictment and terminated the proceedings.

In *Hamilton-Brown Shoe Co.* v. *Wolf Brothers*, 240 U.S. 251 (1916), where the court of appeals reversed and remanded for an accounting and injunction, the case at that juncture "involved no question of public interest

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struction of the statute upon which the indictment or information is founded." 18 U.S.C. § 3731 (1964 ed.).

Subsequently § 3731 was amended to expand the scope of the courts of appeals' appellate jurisdiction. Title 18 U.S.C. § 3731 (1976) now provides in pertinent part:

> "In a criminal case an appeal by the United States shall lie to a court of appeals from a decision, judgment, or order of a district court dismissing an indictment or information as to any one or more counts, except that no appeal shall lie where the double jeopardy clause of the United States Constitution prohibits further prosecution."

and general importance, nor any conflict between the decisions . . . of Federal courts of different circuits." 240 U.S. at 258. As shown above, these elements exist here. *Brotherhood of Locomotive Firemen & Enginemen* v. *Bangor & Aroostook Railroad*, 389 U.S. 327 (1967), concerned a district court's temporary restraining order forbidding a strike, for violation of which the district court entered contempt orders and substantial fines. The court of appeals, after ruling on various issues, remanded to the district court to reconsider the contempt orders and the magnitude of the fines. Under these circumstances, this Court held the case was not ripe for review here. 389 U.S. at 328. In the instant case, however, there is nothing that the district court has been directed to reconsider.

In *American Construction Co.* v. *Jacksonville, Tampa & Key West Railway*, 148 U.S. 372 (1893),[3] this Court noted that if the allegation that a lower court judge had participated in the court of appeals decision was true, the decree of the court of appeals would be void, and "should certainly be set aside or quashed by any court having authority to review it by appeal, error or *certiorari*." 148 U.S. at 387. The Court further held that, "If the decree of the Circuit Court of Appeals is void, because one of the judges who took part in the decision was forbidden by law to sit at the hearing," a writ of certiorari was in order, and the Court granted a rule to show cause why a writ of certiorari should not issue on that ground. *Id.* at 388. *American Construction Co.* thus supports the grant of certiorari here, and not the Government's opposition. For here too, if petitioners are correct in contending that the Fifth Circuit had no jurisdiction to entertain the appeal or render its decision,

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[3] In *American Construction Co.*, case No. 15, the court of appeals reversed an order setting aside the appointment of a receiver, dissolved the stay of proceedings which had been entered below, and remanded to the lower court for a determination of an appropriate receiver.

then the court of appeals' decision is "void" and this Court should grant certiorari to set it aside.

II. THE GOVERNMENT'S BRIEF IN OPPOSITION IN *ZANG* v. *UNITED STATES* IS NOT APPOSITE

The Government also errs in relying in its Memorandum in Opposition on the brief in opposition filed in *United States* v. *Zang*, 653 F.2d 493 (Temp. Emer. Ct. App. 1981), *cert. denied*, No. 81-146, 50 U.S.L.W. 3248 (Oct. 5, 1981) (Mem. Opp. 2 n.2). The jurisdictional issue posted by this case is altogether different from the jurisdictional issue presented by petitioners in *Zang*. *See* Pet. 11 n.13.

The defendants in *Zang*, in contrast to petitioners here, relied solely on the face of the indictment in asserting that the TECA had exclusive jurisdiction over their appeal. They relied on the contention that the indictment was predicated on EPAA violations before the TECA,[4] and they relied on it again in their petition for certiorari.[5] In its brief in opposition to that petition, the Government argued that the TECA had no jurisdiction over the appeal because, "contrary to petitioners'

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[4] *See* Reply Brief of Appellant W. Darrell Zang at 4, *United States* v. *Zang*, 645 F.2d 999 (Temp. Emer. Ct. App. 1981) ("It is clear from . . . the material which the Government has presented that *this Indictment* is a case or controversy arising under the EPAA.") (emphasis supplied).

[5] *See* Petition for a Writ of Certiorari to the Temporary Emergency Court of Appeals, *United States* v. *Zang* (No. 81-146), at 10-11 ("criminal penalties arise directly under the plain meaning of [the EPAA] and in so doing form 'original ingredients' of *the complaint on which Petitioners were convicted*") (emphasis supplied); Brief for the United States in Opposition, *Zang* v. *United States*, at 4 ("Petitioners contend that the EPAA and its underlying regulations formed the basis for their *indictment*, and that therefore TECA has exclusive appellate jurisdiction over the appeals from their criminal convictions.") (emphasis supplied).

claims, the EPAA did not form the basis for their *indictment*." Brief for the United States in Opposition, *Zang* v. *United States*, at 4 (emphasis supplied).

Whether or not the Government's position in *Zang* was well taken, it provides absolutely no support for their position in this case. Although the indictment here is in some respects similar to the indictment in *Zang*,[6] petitioners here did not—and do not—rely on the contention that the indictment was based on the EPAA in asserting that the TECA had exclusive jurisdiction over the Government's appeal. Rather, petitioners predicated TECA jurisdiction on two *defenses* presented by their motion to dismiss the indictment—defenses which depended upon an "interpretation of the substantive provisions of the [EPAA]." *Bray* v. *United States*, 423 U.S. 73, 75 (1975) (*per curiam*). These defenses were adjudicated by the district court. As the Government itself states in its memorandum, "[t]he district court dismissed the indictment on the grounds [1] that the EPAA preempts application of 18 U.S.C. §§ 1341, 1001 and 1962 to the conduct alleged in the indictment and [2] that the certification regulation does not give fair notice and cannot be the predicate for a criminal prosecution." (Mem. Opp. at 2).

The Fifth Circuit's assertion of jurisdiction over the Government's appeal from the dismissal of the indictment is inconsistent with numerous other decisions recognizing that, notwithstanding *Louisville and Nashville Railroad Co.* v. *Mottley*, 211 U.S. 149 (1908), the TECA has exclusive appellate jurisdiction where a district court adjudicates an EPAA issue raised by way of counterclaim or defense. *See* Pet. 6-18. The Government's brief in *Zang* simply does not address that question.

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[6] *But see* Pet. 23 n. 29 (noting that the indictment in *Zang*, unlike the indictment in this case, charged a fraud independent of the alleged miscertification of "old" oil as "new" oil).

CONCLUSION

For the foregoing reasons and those set forth in the petition for certiorari, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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